REFRAMING LEGAL EDUCATION'S "WICKED PROBLEMS"

Judith Welch Wegner[1]

INTRODUCTION

Developing a prospectus for the future of legal education is a tall order. Happily, Rutgers-Newark's School of Law has had a history of turning challenges into opportunities, and pioneering strategies for educating aspiring lawyers who in turn have helped build a better world.

It is thus a great pleasure to join with students, faculty, alumni, and friends of the School in conversations to engage this challenge as part of the Law School's Centennial Celebration.[2]

Change is in the air for legal education, if the number of conferences, symposia, and editorials on the subject are any indication.[3] In the last two years, two major studies, one by the Carnegie Foundation for the Advancement of Teaching (*The Carnegie*

---

1. Judith Welch Wegner received her B.A. from the University of Wisconsin-Madison in 1972, and her J.D. from the UCLA School of Law in 1976. She is currently Burton Craige Professor of Law at the University of North Carolina – Chapel Hill, where she joined the faculty in 1981 and served as dean from 1989-1999. Wegner is co-author of *The Carnegie Report*. W. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter EDUCATING LAWYERS]. The views expressed in this article reflect the author's views and not necessarily those of the Carnegie Foundation for the Advancement of Teaching.

2. For earlier reflections on legal education reform and curricular development, see Judith Welch Wegner, *The Changing Course of Study: Sesquicentennial Reflections*, 73 N.C. L. REV. 725 (1995) (an essay in conjunction with the UNC School of Law's Sesquicentennial celebration); Judith Welch Wegner, *The Curriculum: Patterns and Possibilities*, 51 J. LEGAL EDUC. 431, 432-44 (2001) (an essay in internationalizing law courses).

3. *See, e.g., Symposium on the Future of Legal Education*, 60 VAND. L. REV. 325 (2007); *Symposium, The Opportunity for Legal Education*, 59 MERCER L. REV. 821 (2008), *Symposium, Radical Proposals to Reform Legal Pedagogy*, 43 HARV. C.R.-C.L. L. REV. 595 (2009); *Symposium, Transnationalizing Legal Education*, 10 GERMAN L. J. 629 (2009).

Report)[4] and one by the Clinical Legal Education Association (*Best Practices*)[5] have provided stimulated discussion among academics and legal professionals.[6] As the insightful contributions by others to the current symposium demonstrate, a growing number of law schools are beginning to embrace changes ranging from their use of technology, curricular mix, international focus, externships, faculty-student partnerships, co-op programs, specialization opportunities, and accelerated degree programs.[7] Leading academics are also asking compelling questions about the professional roles, responsibilities, and "identity" of those who emerge from our schools to take up the mantle of the profession.[8] Rutgers itself has demonstrated the power of pro bono work and strong clinical programming in fostering justice.[9]

This essay seeks to place these important initiatives into a broader context, by "reframing" several key challenges faced by advocates of legal education reform. It proceeds in two parts.

In Part I, it explains the concept of "wicked problems"[10] to illustrate some of the fundamental dynamics that make such reform difficult to achieve. It also explains why reform of legal education involves "wicked problems" that are not susceptible to swift resolution. Using a prototypical "wicked problem" (as depicted in the

---

4. *See* EDUCATING LAWYERS, *supra* note 1.

5. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007).

6. *The Carnegie Report* and the *Best Practices* study have been featured at major meetings of the American Bar Association, the Association of American Law Schools and the National Conference of Bar Examiners, among others. For web-based resources from a recent conference on related issues, see links to major conferences at Best Practices for Legal Education, http://bestpracticeslegaled.albanylawblogs.org/ (last visited Aug. 27, 2009).

7. *See, e.g.*, Michelle Anderson, *Legal Education Reform, Diversity, and Access to Justice*, 61 RUTGERS L. REV. 4, 1011 (2009); David S. Clark, *American Law Schools in the Age of Globalization*, 61 RUTGERS L. REV. 4, 1037 (2009); Roger J. Dennis, *Building a New Law School: A Story From the Trenches*, 61 RUTGERS L. REV. 4, 1079 (2009); Lisa A. Kloppenberg, *Educating Problem Solving Lawyers For Our Profession and Communities*, 61 RUTGERS L. REV. 4, 1099 (2009); Peter W. Martin, *Employing Technology to Erode Legal Education's Twin Barriers of Distance and Cost*, 61 RUTGERS L. REV. 4, 1115 (2009); David E. Van Zandt, *Foundational Competencies: Innovation in Legal Education*, 61 RUTGERS L. REV. 4, 1127 (2009).

8. *See, e.g.*, Daisy Hurst Floyd, *Lost Opportunity: Legal Education and the Development of Professional Identity*, 30 HAMLINE L. REV. 555 (2007); DEBORAH L. RHODE, IN THE INTERESTES OF JUSTICE: REFORMING THE LEGAL PROFESSION (2000); *Symposium, The Formation of an Ethical Professional Identity in the Peer-Review Professions*, 5 UNIV. OF ST. THOMAS L. J. 361 (2008).

9. *See, e.g.*, YOU CAN TELL IT TO THE JUDGE . . . AND OTHER TRUE TALES OF LAW SCHOOL LAWYERING (Frank Askin ed., 2009) (discussing Rutgers-Newark clinical program litigation and the role of faculty, students, and alumni).

10. For a definition of "wicked problems," see *infra* text accompanying note 12.

well-known children's tale *Rumpelstiltskin*, wherein the heroine
must find a way to turn straw into gold and save her child from the
adverse effects of an unwise promise), the essay then identifies four
key lessons embedded there that can prove helpful in dealing with
wicked problems such as those associated with reforming legal
education.

In Part II, the essay applies these four significant lessons to
address key dilemmas facing legal education reformers. In Section A,
it suggests that several important "commonplaces" underlie
professional work and accordingly should drive professional
education (including legal education), thereby providing a fresh
framework for actionable steps to improve legal education and the
practice of law. Section B next discusses the need to attend both to
visible and *invisible* dimensions of problems in order to shape
meaningful solutions.   It explains the importance of often
unrecognized dynamics of learning and teaching as major forces that
play crucial roles in legal education and curriculum reform.

Section C of Part II discusses the power of naming, offering an
in-depth look at the nuances of "thinking like a lawyer" as
understood by students and faculty members interviewed at sixteen
diverse law schools in connection with the site visits that informed
the *Carnegie Report*. It stresses the specific ways that first year
case-dialogue instruction forces students to deal with uncertainty,
one of the critical dimensions of professional practice, and unpacks
the notion of "thinking like a lawyer" in ways that should prove
illuminating for students and helpful for faculty members who seek
to help students understand the resulting changes in epistemology
that are so central to the first year of law school. It also considers the
nature of the "case-dialogue method" and explains the ways in which
that classic teaching technique plays a critical role in building
students' abilities to think analytically.

Section D then considers one of legal education's most
intransigent "wicked problems": the upper division curriculum.
Using insights from the theory of "wicked problems" discussed in
Part I, this section of the essay endeavors to explain why upper
division curriculum reform is so difficult. It then offers four
strategies for "renegotiating" existing assumptions and practices in
order to improve the upper division curriculum. These strategies
(including purposeful redesign on the large scale, rethinking content,
rethinking pedagogy, and rebalancing teaching and learning
responsibilities) very likely need to be used in concert in order for
meaningful improvements to occur.

In sum, the essay that follows offers fresh insights as to why
legal education reform is so difficult, drawing upon the theory of
"wicked problems" increasingly used in public policy, engineering and

a variety of other fields. It demonstrates the application of that theory with reference to the oft-told tale of *Rumpelstiltskin*, and draws from that tale key lessons that can be used by those seeking to create a new prospectus for legal education in coming years. It then illuminates four "wicked problems" that have plagued legal education for years: how responsibility should be allocated for lawyer preparation; why change in content alone does not result in enduring improvements in legal education; whether "thinking like a lawyer" has a continuing place in legal education; and how the upper division can be fruitfully improved. In illuminating these problems, it also offers suggestions for how they might be approached and resolved.

PART I: OF WICKED PROBLEMS AND RUMPELSTILTSKIN[11]

A. *Wicked Problems: Reframing the Challenge*

The phrase "wicked problem" entrances the imagination, bringing to mind *Buffy the Vampire Slayer* and *Faust*. In its current incarnation, the term was coined by Horst Rittel and Melvin Webber[12] to describe a class of problems that cannot readily be resolved by conventional analytical means, particularly in the realms of public policy or design.

In their view, a "wicked problem" is one that cannot be definitively described or understood (since it is differently seen by differing stake-holders, has numerous causes, and is often a symptom of other problems).[13] "Wicked problems" cannot readily be

---

11. Interestingly, the story of Rumpelstiltskin is more variable than many readers might assume. The name of the villain (or protagonist, depending on one's viewpoint) is variously spelled as "Rumpelstiltskin" or "Rumplestiltskin," or is rendered in altogether different terms depending on the society in which the story is embedded. Although best known as a tale told by the Brothers Grimm, even the Grimm brothers rendered the story differently in the several versions of the tale that appeared in their works over twenty years. *See* GAIL DEVOS & ANNA E. ALTMAN, NEW TALES FOR OLD: FOLKTALES AS LITERARY FICTIONS FOR YOUNG ADULTS 233-66 (1999) [hereinafter NEW TALES FOR OLD] (discussing the variations on Rumpelstiltskin, its evolution from oral folk tale, changes made in different versions associated with the Brothers Grimm, and varying versions found in other cultures). The version cited in this article is JACOB GRIMM & WILHELM GRIMM, THE COMPLETE FAIRY TALES OF THE BROTHERS GRIMM 193-96 (Jack Zipes ed. & trans., 3rd ed. 2002) [hereinafter COMPLETE FAIRY TALES OF THE BROTHERS GRIMM]. Zipes' translation of *Kinder Und Hausmarchen*, which was published in 1812 and 1815, is based on the seventh and final edition of that publication, dated 1857.

12. Horst Rittel & Melvin Webber; *Dilemmas in a General Theory of Planning*, 4 POL'Y SCIS. 155-69 (1973); *see also* E. Jeffrey Conklin, *Wicked Problems & Social Complexity*, *in* DIALOGUE MAPPING: BUILDING SHARED UNDERSTANDING OF WICKED PROBLEMS 3 (2006); C. West Churchman, *Wicked Problems*, 14 MGMT. SCI. 4 (1967).

13. Rittel and Webber cite ten characteristics of "wicked problems" that are summarized in the text. More specifically, these ten characteristics include: "there is no definitive definition of a wicked problem"; "wicked problems have a 'no stopping

resolved (since they are characterized by a "no stopping rule" resulting from cascading consequences that are difficult to discern at the outset), and can only be addressed in "better or worse" ways, rather than by proving solutions are "true" or "false."[14] "Wicked problems" occur when the factors affecting possible resolution are difficult to recognize, contradictory, and changing; the problem is embedded in a complex system with many unclear interdependencies, and possible solutions cannot readily be selected from competing alternatives. [15]

   Framing issues as "wicked problems" is relatively uncommon in the legal literature, with the phrase used most often in describing public policy dilemmas related to the environment planning and health.[16] Those in other fields have employed the term more often to describe such dilemmas as those relating to design, interdisciplinary collaboration, managing watersheds, preventing forest fires, and working in teams.[17]   A recent *Harvard Business Review* article argues that developing a business "strategy" may constitute a

---

rule'"; "solutions to wicked problems are not true-or-false, but good-or-bad"; "there is no immediate and no ultimate test of a solution to a wicked problem"; "every solution to a wicked problem is a 'one-shot operation'"; because there is no opportunity to learn from trial-and-error, every attempt counts significantly"; "wicked problems do not have an enumerable (or an exhaustively describable) set of potential solutions, nor is there a well-described list of permissible operations that may be incorporated into the plan"; "every wicked problem is essentially unique"; "every wicked problem can be considered as a symptom of another problem"; "the existence of a discrepancy in describing a wicked problem can be explained in numerous ways[;] the choice of explanation determines the nature of the problem's resolution"; "the planner has no right to be wrong." Rittel & Webber, *supra* note 12, at 161-64.

   14.   *Id.* at 162.

   15.   *Id.* at 162-65.

   16.   *See, e.g.,* Richard Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future,* 94 CORNELL L. REV. 1153, 1158-59 (2009) (discussing climate change); Sharon Lewis, *The Tissue Issue: A Wicked Problem,* 48 JURIMETRICS J. 193 (2008) (discussing the development of personalized medicine and related questions regarding treatment of tissues).

   17.   *See* Richard Coyne, *Wicked Problems Revisited,* 26 DESIGN STUD. 5 (2005) (discussing architecture's studio design culture); Arild Buanes & Svein Jentoff, *Building Bridges: Institutional Perspectives on Interdisciplinarity,* 41 FUTURES 446 (2009) (discussing challenges relating to interdisciplinary collaboration); F. Stuart Chapin et al., *Increasing Wildfire in Alaska's Boreal Forest: Pathways to Potential Solutions of a Wicked Problem,* 58.6 BIOSCIENCE 531 (2008) (discussing wildfires); Femke Kirschner, Fred Paas & Paul Kirschner, *Individual and Group-Based Learning from Complex Cognitive Tasks: Effects on Retention and Transfer Efficiency,* 25 COMPUTERS IN HUMAN BEHAVIOR 306 (2009) (discussing individual and collaborative learning); Cecilia Ferreyra, Rob C. de Loe & Reid D. Kreutzwiser, *Imagined Communities, Contested Watersheds: Challenges to Integrated Water Resources Management in Agricultural Areas,* 24 J. OF RURAL STUD. 304 (2008) (discussing watershed management).

prototypical "wicked problem" in the current world.[18]

Rittel and Webber caution against treating "wicked problems" as "tame problems" by mistake. "Tame problems" are those that are more readily susceptible to traditional solutions using standard techniques: defining the problem, understanding it, gathering information, crafting and evaluating solutions, choosing a solution and assessing the result.[19] "Wicked problems" will re-emerge if such strategies are employed, since constraints change, stakeholders resist, and "solutions" simply trigger additional problems.[20] In their view, solutions to "wicked problems" are impossible unless the problem itself is truly "tamed."

Others, drawing on the Rittel and Webber work, have built upon this basic analysis in significant ways. Dr. Jeffrey Conklin illuminates further challenges by in-depth consideration of "wicked problems" involving design. In his view, responses to most problems (wicked or tame) involve design decisions. Design decisions are reached by understanding the nature of the problem (often articulated in terms of what ought to be done as perceived by different stakeholders with varying needs and desires), and what can be done (given relevant constraints such as resources and other controlling realities).[21] Design decisions may also be situated in contexts involving technical and social complexity.

When the inherent challenges of wicked problems are associated with other sources of complexity such as these, fragmentation occurs, making it very difficult to come to meaningful resolution. Fragmentation compounds responses because differing shareholders are likely to use different language in describing a problem or become frustrated because their attention is drawn to diverse facets of interrelated aspects of a compound problem. Competition for resources (funding, attention, time) to address different aspects can also lead to deadlock. Lack of information (and the costs of deriving meaningful information) creates technical challenges. Competing

---

18. John R. Camillus, *Strategy as a Wicked Problem*, HARV. BUS. REV., MAY 2008, at 99 (discussing the challenges facing businesses which need to develop strategies for working in an international environment, citing the characteristics of "wicked problems," and suggesting such steps as involving stakeholders, documenting opinions, and communicating; defining corporate identity; focusing on action; and developing a "feed-forward" (rather than feedback) orientation).

19. *See* Rittel & Webber, *supra* note 12, at 160.

20. *See id.* at 161-62 (explaining why problems such as understanding poverty or improving the educational system are so intransigent).

21. *See* Conklin, *supra* note 12, at 16-18 (discussing new car design as a "wicked problem"); *id.* at 23-30 (discussing "social complexity" relating to the number and diversity of players involved in a problem); *id.* at 30-32 (discussing the challenges of what could be versus what is feasible given resources in connection with developing designs to solve problems).

views can lead to fraying tempers.

In addition, as Conklin notes, grappling with "wicked problems" often requires dynamic attention to both the problem definition process and the solution development process at the same time. That strategy can seem off-putting or illegitimate to those who view most problems as "tame" and best approached in the step-wise fashion described by Rittel and Webber (define the problem, gather information, identify solutions, evaluate solutions, and so forth). Conklin (like Rittel and Webber) cautions against trying to pretend that a "wicked problem" is instead a "tame" one, noting that there are four common ways that people often fall into that trap. For example, they may restate the problem they are facing in a way that *can* be solved (rather than naming the problem in its full complexity), or characterize it as the same as a problem that has been solved previously (providing a short-cut to a solution).[22] Other risks include ducking the need to develop a good solution, or prematurely narrowing possible solutions in the interest of simplicity.[23]

In light of these challenges, Conklin recommends that intensive attention be devoted to building shared understanding of complex problems, drawing in the full range of shareholders. He also stresses the importance of building shared commitment to solutions.[24]

Many organizations find dealing with rapid and novel change disconcerting, particularly when conflict and disagreement among shareholders and competing values are concerned. Academic institutions find change particularly difficult for many reasons.[25] Confronting "wicked problems" about institutional operation and educational design are especially challenging.[26] Academic institutions are generally "loosely coupled," with little definitive

---

22. *Id.* at 21-22.

23. *Id.* at 22.

24. *Id.*

25. For in-depth discussion of issues of change in higher education, see 28 ASHE-ERIC HIGHER EDUCATION REPORT NO. 4, UNDERSTANDING AND FACILITATING ORGANIZATIONAL CHANGE IN THE 21ST CENTURY: RECENT RESEARCH AND CONCEPTUALIZATIONS 70-71 (Adrianna Kezar ed., 2001) [hereinafter UNDERSTANDING AND FACILITATING ORGANIZATIONAL CHANGE] (differentiating "tightly coupled" systems as highly centralized, non-differentiated, highly coordinated, with strict division of labor in comparison to "loosely coupled" systems such as universities which have highly specialized labor, greater differentiation among components, limited coordination, and low susceptibility to change). For discussion of change at the departmental level, see also B.E.F. WALFORD ET AL., 27 ASHE-ERIC HIGHER EDUCATION REPORT NO. 8, ACADEMIC DEPARTMENTS: HOW THEY WORK, HOW THEY CHANGE (2000) (relating to departmental change).

26. For an essay outlining the "wicked problems" facing university managers from a British point of view, see David Watson, *Managing in Higher Education: The Wicked Issues*, 54 HIGHER EDUC. QUART. 5 (2000).

information available about the academic programs or others or ready means to exchange tested insights about curricular change between such institutions.[27]   Individual faculty members juggle competing demands on their time, and increasingly are expected to give attention to research productivity rather than teaching or service.[28]

The legal academy may be particularly disinclined to engage with "wicked problems." The professoriate has become increasingly homogeneous and has very little training in educational effectiveness or assessment principles.[29]   The American Bar Association's (ABA) accrediting standards and practices encourage standardization in approaches rather than experimentation.[30]   There is little, if any,

---

27. *See* UNDERSTANDING AND FACILITATING ORGANIZATIONAL CHANGE, *supra* note 25, at 70-71 (differentiating "tightly coupled" systems as highly centralized, non-differentiated, highly coordinated, with strict division of labor in comparison to "loosely coupled" systems such as universities which have highly specialized labor, greater differentiation among components, limited coordination, and low susceptibility to change). For an exceptionally insightful discussion of the ways in which colleges and universities increasingly strive to emulate those higher up the prestige pecking order, see KerryAnn O'Meara, *Striving for What? Exploring the Pursuit of Prestige*, in 22 HIGHER EDUCATION: HANDBOOK OF THEORY AND RESEARCH 121 (J.C. Smart ed., 2007) [hereinafter *Pursuit of Prestige*] (discussing the ways in which "striving" institutions have tended to reallocate resources in certain concrete and measureable ways, such as toward research, student services and recruitment, additional graduate programs, and honors programs).

28. *See Pursuit of Prestige, supra* note 27, at 143-44 (discussing academic reward system); *see generally* 34 ASHE HIGHER EDUCATION REPORT, FACULTY CAREERS AND WORK LIVES: A PROFESSIONAL GROWTH PERSPECTIVE 3 (2008) (discussing trends in faculty work patterns); JACK H. SCHUSTER & MARTIN J. FINKELSTEIN, THE AMERICAN FACULTY: THE RESTRUCTURING OF ACADEMIC WORK AND CAREERS (2006).

29. For a discussion of faculty hiring patterns, see Robert J. Borthwick & Jordan R. Schau, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J.L. REFORM 191 (1991). *See also* Richard E. Redding, *Where Did You Go to Law School? Gatekeeping for the Professoriate and its Implications for Legal Education*, 53 J. LEGAL EDUC. 594, 599 (2003). For statistics about the current composition of the law professoriate and of candidates for law faculty positions, see Ass'n of Am. Law Schs., Statistical Report on Law Faculty Index, http://www.aals.org/resources_statistical.php (last visited Sept. 16, 2009). For a listing of law schools attended by those teaching in 2008, see also Ass'n of Am. Law Schs., 2007-2008   AALS   Statistical   Report   on   Law   Faculty   Index, http://www.aals.org/report_09_08.pdf (last visited Sept. 16, 2009).

30. AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2009-2010 (Sept. 2008), http://www.abanet.org/legaled/standards/ standards.html [hereinafter ABA STANDARDS]. The ABA's Standards include provisions for variances but impose high standards of proof as to law schools who seek to avail themselves of the variance provisions. *See id.* The ABA is currently reviewing certain aspects of its standards and accreditation processes. For a historical review and critique of ABA accreditation, see George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091 (1998). For a discussion of ABA accreditation from an experienced dean who has

capacity or inclination to engage in program assessment within law schools unless regional accreditors who review parent colleges and universities or university leaders force law schools to engage in more significant program assessment as they have increasingly done with units within the Arts and Sciences.[31]

Admissions tests are validated with reference to first year law school grade performance, which is generally based on a generous "curve" rather than objective quality benchmarks,[32] and national bar exam questions are validated against undergraduate GPA and LSAT (the quantitative measures used in admissions decisions by many

---

played a leading role in that process, see generally Steven R. Smith, *Gresham's Law in Legal Education*, 17 J. CONTEMP. LEGAL ISSUES 171 (2008) (discussing relationship between accreditation, federal oversight, AALS membership, and bar licensure, and contending that there is considerable flexibility within the ABA Standards if not always recognized).

31.   Both the ABA's Section on Legal Education's Standards for Approval of Law Schools and the AALS's membership requirements state that law schools should periodically review their curricula. *See* ABA STANDARDS, *supra* note 30, at 21, 23, std. 302 ("A law school shall engage in periodic review of its curriculum to ensure that it prepares the school's graduates to participate effectively and responsibly in the legal profession"). *See also* Ass'n of Am. Law Schs., *By-Laws and Executive Committee Regulations Pertaining to the Requirements of Membership*, http://www.aals.org/about_handbook_requirements.php (last visited Sept. 16, 2009) ("b. The curriculum of a member school shall be the result of a curriculum planning process by the faculty, which shall include a periodic review of the curriculum for its content and pedagogical effectiveness."). The ABA has recently required law schools to give considered attention to "outcomes" such as bar passage rates of their graduates. *See* ABA STANDARDS, *supra* note 30. Various regional accreditors such as the Southern Association of Colleges and Schools require colleges and universities seeking reaffirmation of their accreditation to develop "quality enhancement plans" and to assess their efforts to achieve goals and strategies incorporated into such "QEPs." *See,* *e.g.*, SOUTHERN ASSOC. OF COLLEGES AND SCHS. COMM'N ON COLLEGES, RESOURCE MANUAL FOR THE PRINCIPLES OF ACCREDITATION: FOUNDATIONS FOR QUALITY ENHANCEMENT (2005), http://www.sacscoc.org/pdf/081705/ QEPpercent20 Handbook.pdf. For recent general background on accreditation trends, see 145 ACCREDITATION: ASSURING AND ENHANCING QUALITY: NEW DIRECTIONS FOR HIGHER EDUCATION (Patricia M. O'Brian ed., 2009).

32.   For a discussion of the interplay of LSAT scores and law school grades, see, e.g., David Thomas, *Predicting Law School Academic Performance from LSAT Scores and Undergraduate Grade Point Averages: A Comprehensive Study*, 35 ARIZ. ST. L.J. 1007 (2003) (considering student LSAT and UGPA data from those attending Brigham Young University's Rueben C. Clark School of Law over a twenty-seven year period and discussing correlation with first year and third year class rank); Phoebe Haddon & Deborah Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 ST. JOHN'S L. REV. 41 (2006) (discussing use of LSAT and alternative approaches to law school admissions in the aftermath of *Grutter v. Bolinger*). Various correlation studies are available from the Law School Admissions Council's website. LSAC, Welcome to LSACnet, http://members.lsac.org/Public/MainPage.aspx?ReturnUrl=percent2fPrivatepercent2f MainPage2.aspx (last visited Sept. 16, 2009) [hereinafter LSAC].

law schools).[33]   While the ABA has now directed law schools to demonstrate their effectiveness in terms of "outcomes" on bar examinations in order to maintain accreditation, schools appear to have addressed this challenge by developing forms of intervention that can assist students who might be at risk of poor performance, rather than attempting to ask how their educational design or admissions strategies result in less than optimum performance.[34] The practicing bar itself is not always desirous that graduating students perform more successfully on bar examinations because increased competition might otherwise result for those already in practice.[35]

There are thus many indicia that suggest that reforming legal education involves a "wicked problem." There is no generally accepted definition of the problems faced (although the recent *Carnegie Report* and *Best Practices* study have suggested some dimensions). There's no "stopping rule" for reform since there are so many interrelated questions that one can never be "done," only exhausted for the moment. Solutions tend to be better or worse, rather than "true or false," despite the tendency of many to wish for confirming evidence before acting. Every "one-shot" reform affects other dynamics within an ever-changing educational institution. There is not a set of standard solutions that takes into account the unique characteristics of individual schools (such as student characteristics, faculty preferences, location, institutional culture, available resources), even though faculty members typically want to know what others have done in order to borrow models from schools viewed as peers.

Conklin's "social complexity" abounds. The stakeholders are many: alumni with different experiences in school and beyond; faculty; students (current and prospective); administrators; accreditors; bar examiners; bar leaders; funders; university leaders; trustees; and legislatures. There is no standard nomenclature or understanding about what actually happens in various classrooms, how courses are best "designed," what happens in clinics or

---

33. For a discussion of correlations between LSAT, UGPA, and bar passage, see LSAC, *supra* note 32 (displaying studies related to the National Longitudinal Bar Passage conducted by LSAC). For a discussion of correlations between bar exam performance, LSAT, and UGPA, and bar exam performance patterns across racial and ethnic lines, see Douglas R. Ripkey & Susan M. Case, *A National Look at MBE Performance Differences Among Ethnic Groups*, 76 THE BAR EXAMINER 21, 21-28 (2007), *available at* www.ncbex.org.

34. *See* ABA STANDARDS, *supra* note 30, at 155.

35. *See* Deborah J. Merritt, Lowell L. Hargens, & Barbara F. Reskin, *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929, 929 n.1 (2001) (discussing developments during the late 1990s when a number of states increased bar examination "cut scores").

internships, what demands various types of future careers place on law graduates, or how prior experiences shape students' approaches to learning during law school.

There is also a good deal of technical complexity. Law faculty members generally lack formal education about assessment and its importance. There is relatively limited meaningful assessment of student performance in individual classes (since one-shot exams are so commonly used and students are graded on the curve), and virtually no longitudinal analysis of student performance apart from performance in individual courses. Rigorous institutional analysis of programs or overall trends is episodic at best. For example, student course registration patterns would be difficult to analyze because so many variables affect decisions and scheduling patterns likely shift from year to year. The most common strategy is to do a quick (not always well-informed) analysis of a topic such as poor student performance on bar exams, without the full range of data that might be valuable. Thus, efforts to reform often lack meaningful predicate information about the extent of challenges at work in the school, and turn instead on anecdotal observations.

Faced with these challenges, how are legal education reformers to proceed, in creating a prospectus for legal education in the future and moving toward implementation? Before turning more specifically to that question, however, it is worth consulting one more source of insight about dealing with "wicked problems" ... the collective human experience, as evidenced in fairy tales. A consideration of the well-known tale of *Rumpelstiltskin* suggests that essential steps for reform-minded legal educators to consider are alternative ways of understanding the problem being addressed, competing interests (be they visible or invisible), critical priorities, and constraints (imagined and real).

B. *Critical Lessons about Wicked Problems: Insights from* Rumpelstiltskin

1. *Rumpelstiltskin*: A Classic Tale

The *Rumpelstiltskin* story is a well-known one, which many adults first encountered in the version presented by the Brothers Grimm.[36] In its simplest form, it goes like this.

A village miller is the father of a beautiful teenage girl (call him "Miller" and her "Millie"). He brags to the king, who is facing financial deficits, that Millie can spin straw into gold. The king calls Millie to the castle and commands that she do so. She is dumbfounded, for in fact she can't spin very well, and certainly can't

---

36. *See* COMPLETE TALES OF THE BROTHERS GRIMM, *supra* note 11, at 193-96.

spin straw into gold. Fearing adverse repercussions, she sits and weeps.

What to Millie's wondering eyes should appear but "a little man" who says he can help her, provided she gives him something first. What does she have? Her necklace. She delivers; he performs his magic. Morning comes, and she expects salvation.

But wait! The king wants more. Millie is locked back into the garret with more straw to spin. The little man reappears. This time, when he makes his demand for a reward, she gives him her ring.

Of course all fairy tales require their heroes and heroines to surmount three tests. Unsurprisingly Millie is back in the garret at nightfall. This time, however, the king offers clearer inducements: if she succeeds once more in turning straw into gold, he will marry her and they will live happily ever after. If she does not succeed, of course, she'll be dead. Millie sits, weeping, until the little man returns. This time she faces a more challenging dilemma, for she has nothing else to offer, having forfeited her necklace and ring. His demand this time is different: "I'll help you but you must give me your first-born child." She consents, thinking that she'll be dead and have no child unless she concedes. The gold appears once again.

The king and Millie marry. Before long a daughter is born (perhaps named Millicent). The little man returns to claim his prize. Millie pleads. The little man considers. He agrees to delay the execution of judgment, but only if she agrees to another test in return: "Tell me my name within three days and your daughter can remain with you; otherwise she's mine." Millie sought counsel from all and sundry. "Tell me all the names you know," she said. When the little man next appeared, Millie began offering all the names she knew. She began with the names of the Three Wise Men and listed every other name she remembered. None did the trick. The next day she again sent forth inquiries into the countryside. Is your name "Ribs-of-beef" or "Muttonchop?" she asked the little man that night. Again, she struck out. Desperate to save her daughter, she sought help from the local forester who returned just in time for her last meeting with the little man. The forester reported that high on the mountain, at the edge of the forest, "where the fox and the hare say goodnight to each other," he'd seen a little man dancing around a fire and singing: "Today I'll brew, tomorrow I'll bake. Soon I'll have the queen's namesake. Oh, how hard it is to play my game, for Rumpelstiltskin is my name!"

Hoping against hope, Millie took stock of what to say when the little man appeared for the final time. She began with some simpler names. "Is your name Heinz?" The little man said no. She tried again, "Is your name Kurtz?" Again, the answer came "no." Finally, she said, "Is your name Rumpelstiltskin?" In response, the little man

screamed and stamped. As one version tells it, "he stamped so ferociously with his right foot that his leg went deep into the ground up to his waist. Then he grabbed the other foot angrily with both hands and ripped himself in two."[37]

2. *Rumpelstiltskin* as Wicked Problem

Why is *Rumpelstiltskin* such a good example of a wicked problem? What lessons does it offer about how to approach wicked problems such as the challenge of legal education reform?

The *Rumpelstiltskin* story shows that "wicked problems" are not readily described or understood. What exactly is the problem confronted? Differing versions of the tale provide different points of entry.[38] Was Millie lazy and a poor spinner whose family wanted to scare her into learning a craft, with the king's help? Is the tale about the false pride of the miller-father who brags about his daughter without knowing her true level of skills in order to aggrandize himself? Is it about the king, who is looking for an implausible quick fix to his budget deficit? Is it about Millie herself, who must decide what really matters in her own life?

The story also demonstrates the difficulty faced in "resolving" (not really "solving") wicked problems. It might appear that the "problem" is how to spin straw into gold. But wait: is it really about knowing what to cherish? Or is it about how to renegotiate a bad bargain? How to seek help from your friends? Clearly, it is about all these things, suggesting the many strands that are tangled into the gnarly challenges of dealing with wicked problems. The tale clearly illustrates Rittel and Weber's "no stopping" rule, since both parts of the story involve three phases: three tests of spinning and three tests of naming.

Rumpelstiltskin speaks to the interplay of problem dimensions and social and technical complexity as described by Conklin. The story is situated against a social and historical context. It may be an object lesson to women to be sure they get the housework done. Some venture that "the little man," Rumpelstiltskin, stands in for European Jews or Gypsies who were not welcomed into the community, and who were stereotyped as stealing or eating children.[39] Was Millie at risk because she is portrayed as a sole

---

37. *See id.* at 196.

38. NEW TALES FOR OLD, *supra* note 11, at 237 (tracing the evolution of the Rumpelstiltskin tale from the oral version which had no parental involvement, to the 1810 version when "Millie" can only spin gold (not flax), to the 1857 version in which Millie's predicament stems from her father's boasting that she can spin flax into gold).

39. Jane Yolen has recast the Rumpelstiltskin story as "Granny Rumple" (a tale in which the kindly wife of a moneylender loans money to "Millie" and, when she goes to collect the money, is accused by Millie as a child-stealer, leading to a pogram). *See*

actor? Why were the miller and king conspiring to put her to the
test? Alternatively, might Rumpelstiltskin really be an invisible part
of Millie's psyche that comes to the fore in times of pressure, and
with which she can negotiate in the end? Millie's problem was also
exacerbated by technical challenges. If she was a good spinner, Millie
would have realized that straw (unlike wool or flax) is too brittle and
bulky to spin. If she had known any alchemists, she would have
realized that the game plan was to turn lead (not straw) into gold
and that she lacked the proper materials. Had she been religious, she
would have realized that alchemy involved metaphors and turned to
prayer.

    Rumpelstiltskin also shows that the problem of spinning straw to
gold or renegotiating a coercive contract do not have "true" or "false"
solutions. Millie proceeded by trial and error, first giving up her
jewelry then her unborn child. She renegotiated her obligation with
the little man later, after realizing how precious her first born
actually was. But she did not ask him why he wanted Millicent to
come home with him. She asked around for names, trying to create
an extensive list that logically would include that of the little man.
She should have asked "who is this little man and what do you know
about him" instead, or realized that he was the original "Man of
Mystery" and could be located only in the mythical land where fox
and hare wish each other good night (and the lion lies down with the
lamb).

    In a sense, too, Millie's solutions reflected misapprehensions of
the problem she was facing, and shifts in problem definition
reflecting her initial efforts at solution. She thought the problem of
spinning involved paying the little man for his services using gold
itself (her ring and necklace), only to find he wanted a part of her
very soul. Moreover, she seemed to jump to solutions before fully
assessing what she was up against. She should have asked more
questions. Was the challenge actually spinning straw into gold, or
finding a way to get her father and the king to let her be herself and
free her from the garret? Perhaps she might have proceeded as did
Scheherazade and traded stories with the king or the little man. The
problem then morphed into protecting her infant. Might she have

---

BLACK THORN, WHITE ROSE 203 (Ellen Datlow & Terri Winding eds., 1995). In a
separate essay, Yolen observed: "So I looked more carefully at the little man,
Rumpelstiltskin, himself. He has an unpronounceable name, lives apart from the
kingdom, changes money, and is thought to want the child for some unspeakable blood
rites. Thwack! The holy salmon of inspiration hit me in the face. Of course.
Rumpelstiltskin is a medieval German story. This is an anti-Semitic tale. Little man,
odd name, lives far away from the halls of power, is a moneychanger, and the old
blood-rites canard." JANE YOLEN, SISTER EMILY'S LIGHTSHIP AND OTHER STORIES 288
(2000).

invited the little man to come to visit or made him her counselor instead?

Millie ultimately succeeded by inviting others into the conversation, rather than assuming that her own view point was the only way to salvation. Although many names she received were not helpful, they added to her knowledge store. She had no means of analyzing which name might be the true one, so just proceeded with one after another, hearing "no" in response each time. Ultimately, it was the counsel of others (the forester, friend of hare and fox) that led her to a resolution, seemingly as a result of forces outside her control or understanding.

In short, *Rumpelstiltskin* appears to be an excellent prototype of a "wicked problem." Millie survived her encounter with related challenges. One more look at the fable may suggest ways in which legal education reformers seeking to transform legal education to a new prototype might do as well.

3. *Rumpelstiltskin*: Lessons for Wrangling with Wicked Problems in Educational Reform

What lessons does *Rumpelstiltskin* offer for those who take on wicked problems such as law school curricular reform? Four of the tale's most powerful lessons are briefly summarized here, with more detailed consideration incorporated in part II below.

Learn about the commonplace. Doing so can save you in the end. In Millie's time, knowing how to spin was a basic life skill at least for women. What are the basic life skills of professionals, not only in law, but also in other fields? Understanding core issues facing professionals can provide important grounding for educational reform undertakings. Understanding core strategies used by educators in a range of professional fields provides a range of "best practices" that reach beyond legal education and are worth consideration as a result.

Problems (and their resolutions) involve both visible and invisible forces, and both need to be understood. Millie's first encounter with the "little man" who appeared from nowhere began her adventure and saved her from death. On the other hand, her failure to probe why he appeared and what he was after nearly sealed Millicent's fate. The lesson here is to pay close attention to all the dynamics that affect education, including those we take for granted. Approaches to teaching, learning, and assessment (what is and is not done) are central to the future of legal education, and must be better understood.

Remember the power of naming. Rumpelstiltskin falls within the class of fairy tales that require the protagonist to "name the helper." In a sense, the spinning of straw into gold is but a warm-up for this

more daunting challenge. Once Millie has named her antagonist, he tears himself apart (or in some versions, flies out the window), never to bother her again. It is worth remembering, however, that it is not just the name "Rumpelstiltskin" that is pivotal, but rather Millie's ability to claim the power to name the challenger who haunts her, learning his true nature as one who lives in the magical land, with the help of her forester-friend. Legal education has embraced the notion that teaching students to "think like lawyers" is its principal claim to fame. However, it needs to delve deeper to appreciate what animates that powerful articulation of its purposes. In addition, the "Socratic method" has been cast as a "bête noir" within legal education. Recasting and explaining this pedagogical approach more clearly can help law faculty do a better job of developing critical thinking skills in the first year.

Consider renegotiating when you hit a dead end. A crucial point in Millie's story occurred when she realized that she could not honor her initial commitment to the little man to give up her child. Without knowing whether he would agree, Millie asked to renegotiate and he agreed, thereby giving her an alternative way out. Legal education reformers should likewise bear in mind that renegotiation strategies may prove essential to curriculum reform. Among other things, it is important to explore a key dichotomy (between theory and practice) in order to appreciate this reform.

These are not the tale's only lessons. Instead, they serve well as a beginning point to illustrate the ways that thinking about "wicked problems" and possible responses can advance the cause of educational reform. Part II employs these lessons as a means of suggesting how those interested in legal education reform might best proceed. Additional lessons worth considering are also offered for reflection there.

PART II: FOUR CONUNDRUMS: REFRAMING LEGAL EDUCATION'S "WICKED PROBLEMS"

Having posited the value of the "wicked problems" prototype and the powerful example of *Rumpelstiltskin* to provide explicit lessons for dealing with legal education reform, this part now puts these earlier observations to the test. Does the "wicked problem" framework indeed prove useful in reframing some of legal education's wicked problems? Can the lessons about attending to commonplaces, paying attention to the invisible, remembering the power of naming, and renegotiating when needed really help reform-minded legal educators in dealing with key challenges?

The four sections that follow answer these questions in the affirmative. Part A first summarizes key insights about the "commonplace" challenges that cut across various professions and

forms of professional education, suggesting that fundamental reformulation of shared challenges facing law students, the legal professoriate, and the legal profession can eliminate counter-productive finger-pointing about who is responsible for improving legal learning, and provide new insights capable of helping faculty teach more effectively and students learn more productively.

Part B explores the underlying dynamics of learning and teaching, surprisingly "invisible" or misunderstood dimensions of curriculum reform. It highlights some of the important insights from the "learning sciences" (including educational research, psychology, sociology, and neurology) that provided the underpinnings of the *Carnegie Report* and explains key concepts relating to learning and teaching.

Parts C and D engage with related issues in more depth. Part C considers critical "naming" that has been used in legal education and discusses in considerable detail the dynamics of "thinking like a lawyer" in the first year, and the reasons that the "case-dialogue method" has such power as a form of pedagogy suitable to the first year of law school. Part D takes on one of the most difficult challenges facing legal educators in the current era: why and how might the upper division curriculum be reformed to prepare students more effectively to take on professional obligations?

A. *Learning about the Commonplace*

One of the most important insights incorporated into the Carnegie Foundation's studies of professional education arose from a set of "commonplaces" developed by President Lee Shulman[40] in consultation with others at the Foundation. Based on his work with medical and teacher education, Shulman posited that there are six major dimensions along which professionals in the field must function (whatever their particular specialty).

Figure 1

> Employ fundamental knowledge and skills derived from an academic base;
> Make decisions under conditions of uncertainty;
> Engage in complex practice;
> Learn from experience;
> Create and participate in responsible professional communities; and
> Have the ability and willingness to provide public service.

---

40. Lee S. Shulman, *Theory, Practice and the Education of Professionals*, 98 THE ELEMENTARY SCH. J. 511 (1998); *see also* Howard Gardner & Lee S. Shulman, *The Professions in America Today: Crucial But Fragile*, DAEDALUS 13 (2005).

This formulation of the core activities of professionals provides educators with a fresh way of formulating instructional goals, assessing their responsibilities, and guiding their students. Law schools have long emphasized the "fundamental knowledge" and analytical "skills" that are the hallmark of legal education. The remaining "commonplaces" have to date been much less likely to surface as fundamental forces explicitly shaping instructional priorities.

For example, legal educators are well aware that the challenge of grappling with uncertainty at times paralyzes first year law students. Working with uncertainty is one of the hallmarks of the "case-dialogue method," which in time helps students to "domesticate doubt" through routine analytical strategies. The emphasis on engagement in "complex practice" places the focus where it should be, not in individual "practice skills" such as negotiation or even legal research, but instead emphasizes the practice "context" in which multiple strategies, skills, and tools must be employed.

Similarly the focus on "learning from experience" drives home the importance of "formative assessment," that is, feedback designed to help students know what they have or have not learned. The emphasis on creation and participation in responsible professional communities illuminates the limitations of employing doctrinally-oriented "professional responsibility" courses as the primary (or sole) means of developing students' abilities to engage with colleagues and to hold themselves and others responsible for professional norms. Attention to pro bono activities during law school is also put into context, since both the commitment and capacity to provide public service link well with understanding professional communities and the values underlying a professional's work.

Recognizing the power of these commonplaces, as underpinnings of the work of professionals is bound to help legal education reformers restate both the need for change and the dimensions of change that is needed in legal education. They can also be enormously helpful in assisting students to appreciate the differences between undergraduate education and education in professional fields. Finally, framing the characteristics of professional work in these fresh terms and recognizing the spectrum of development that occurs throughout one's education and life as a professional should offer new ground on which partnerships between educators and the legal profession can be built.

B. *The Importance of Both the Visible and the Invisible*

Debates on curriculum change often focus primarily on course

requirements and content. How many hours should each first year subject receive? Isn't there need for additional advanced offerings in xxx (pick your subject area) since there is so much important and sophisticated work being done in that field? Should the law school develop concentrations in particular fields to up its visibility and national reputation? Since schools' reputations are built upon the talents of their faculty members, shouldn't faculty research interests drive the curriculum after all?

Most faculty members have had discussions on these topics, often more than once. The courses offered, the units they receive, the frequency with which they appear on the course schedule, and the number of advanced opportunities in a given field are the "visible" part of most efforts at curriculum reform. There are at least three other arenas that are typically "invisible" and these may be the key to unraveling the challenges presented by legal educations "wicked problems." These arenas are the nature and drivers of student learning and the power of teaching. Each of these "invisible" arenas is worth considering here.

1.   Invisible Dimensions: Student Learning

Most legal educators are ignorant about the profound developments in the "learning sciences" (psychology, cognitive and neurological studies, physiology, and more) that have occurred since they attended law school. A superb study, *How People Learn,* published by the National Academies Press,[41] illustrates how much has been learned about the nature of learning from infancy through adulthood.

The Carnegie Foundation's work on professional education was deeply informed by developments in the learning sciences, and that emphasis is important for a number of reasons. First, "learners" are too often absent in educators' conversation about education, since teachers tend to think of "teaching" and "curriculum" as central, whatever the effects on what students actually gain. The emphasis on learning also provides educators with intellectual frameworks and terminology that can guide decisions about the structure of courses, student instruction, and larger scale instructional program design.

a.   Expertise

Those involved in professional education should give special attention to insights about the development of "expertise." The development of "expertise" has been studied across a myriad of fields ranging from chess players to historians to educators. Experts are typically those who possess both the "know what" and the "know

---

41.   JOHN D. BRANSFORD ET AL., HOW PEOPLE LEARN (2000).

how" that allows them to demonstrate great skills in solving problems in a particular domain. The movement from "novice" to "expert" is a journey that occurs in the context of many domains. Bransford and others have summarized key research about the characteristics of "experts."[42] Experts "notice" patterns not seen by novices. They possess a great deal of content knowledge, and organize or "chunk" that knowledge in ways that reflect deep understanding. Expert knowledge develops in context through experience with myriad scenarios, and becomes deeply internalized so relevant insights can be retrieved with relatively little conscious effort. Tacit learning (including observation, imitation, and experience) is important in the development of expertise, since expertise is characterized by much more than "book learning." Expertise develops in stages, from initial acclimation through competence, to proficiency and excellence. Experience in working with poorly defined problems is essential to developing expertise.[43]

b. Assessment

The role of assessment in driving learning is another area of insights little known to legal educators. There are generally two types of assessment, "summative" assessment and "formative" assessment. Summative assessment involves a snapshot judgment of what a student knows at a particular time and is often used as a tool to evaluate where a student stands in terms of achieving ultimate educational objectives or where the student stands with respect to others. Summative assessment is well known in law schools, and is generally based on "story problem" examinations, multiple choice questions, papers, or other work product. Strikingly, essay exams seem to track "expertise" in dealing with complex factual scenarios, but grading systems in law schools fail to recognize that expertise develops over time. Formative assessment on the other hand is designed to provide feedback and guide students to improve and learn further, based on feedback that enhances their capacity to build on what they know and address areas of misunderstanding. Formative assessment is likely well-known to law librarians, for as they "coach" student researchers to follow a meaningful path to retrieve needed information, they often ask and answer questions, shaping search strategies little by little, while guiding novice researchers toward their ultimate goal.[44]

The role of assessment in driving learning is often forgotten by

---

42. *Id.* at 31-50.

43. For additional discussion of expertise, see *infra* text accompanying note 44 and notes 254-60.

44. For further discussion of law school assessment, see *infra* text accompanying note 87.

educators even though evidence of that truism lies all around. Instructors are quite familiar with students who ask "will it be on the test?" in deciding what exactly they will study. Law schools are not immune from this phenomenon. Why else would *U.S. News & World Report* ratings be driving admissions decisions and resource allocations? Why else would the ABA require "outcome measures" of law school performance tied to student performance on bar exams as part of the accreditation system? The Carnegie Foundation's focus on assessment sheds light both on the multiple forms of assessment, and the power of assessment strategies for driving educational decisions at the instructor and program level. Too often assessment is seen as the end of the story, when in fact, it provides a means of continuing improvement.

c. The Three "Apprenticeships" and Student Learning

One of the great strengths of the Carnegie Foundation's "preparation for the professions" program has been its effort to bring comparative insights to bear across differing professional fields. In service to that venture, the *Carnegie Report* (and other companion studies in clergy, engineering, nursing and medicine) employ a three-fold framework of metaphorical "apprenticeships" useful in conceptualizing the dimensions of professional education, and illuminating strengths and gaps based on comparisons.[45] "Apprenticeship" is used here to illuminate the diverse types of learning that must take place, much as 4-H clubs consider "head, hands, heart and health." In the context of professional education, students must learn to "think and know," "do and act," and "believe and be" while wrapping these dimensions into a meaningful whole.

The first "cognitive" apprenticeship focuses on developing students' thinking skills in the specific context of legal materials and law-related content. It has both a knowledge context and an epistemological character. In short, students must learn "what counts" by way of knowledge, and how to construct knowledge for themselves within this particular field. The "cognitive" apprenticeship fits exceptionally well with the "case-dialogue method" and with legal education's place in the academy. Not surprisingly, the *Carnegie Report* found that legal education handles the cognitive apprenticeship very well.

The second apprenticeship of "skill and practice" focuses on developing students' abilities to understand and intervene in particular contexts and to "perform" as expert professionals responsible for the well-being of others. The second apprenticeship is one that law schools have approached in a patchwork fashion, adding

---

45. EDUCATING LAWYERS, *supra* note 1, at 27-34.

"skills" courses, externships and clinical opportunities over the years. Even first year legal writing programs (with legal research on the side or more central) have in many schools been relegated to the margin of the educational enterprise. Many law faculty members do not fully appreciate the importance of legal writing courses in bolstering students' analytical strengths, providing them with an important context in which to learn from experience, engaging them in solving poorly defined problems, exposing them to the art forms and acts required of lawyers in practice, and modeling fresh forms of lawyering (such as coaching and counseling). Similarly, courses that introduce legal research to first year students may be marginalized because they are seen as a venue for introducing very detailed information about sources (what sources exist, what is their value for diverse purposes, how should they be cited), rather than valued as emphasizing the exercise of professional judgment regarding what information is needed, how its quality is best assessed, and how diverse forms of knowledge should best be integrated and employed to accomplish important tasks. In short, legal education has not really embraced the need for students to learn to "do and act" or appreciated the ways in which "doing and acting" are powerful means to fuel learning of substance itself.

The third apprenticeship of "identity and purpose" concerns the development of students' appreciation for professional roles, possibly conflicting dimensions of those roles, ethical obligations, and individual meaning derived by professionals from the work they do. This apprenticeship is the one that seems most absent and least well understood within the legal education universe of today. While law schools added required courses in "professional responsibility" at the behest of the ABA following the Watergate scandal of the 1970s, many such courses focus on imparting "the law of lawyering," rather than grappling with deeper issues of lawyers' values, roles, and identity. Instead, students must rely upon the "hidden curriculum" (optional speakers, orientation programs, extracurricular activities), pro bono initiatives, and clinical offerings to probe the questions that are near and dear to their futures, and their hearts.

Taken together, the three apprenticeships should lead students through the process of "professional formation." They should help students integrate new epistemology, knowledge, skill in action, and professional responsibilities and beliefs. Some fields, such as preparation for service as a member of the clergy, are adept at this important, but often invisible, integration process. Legal education is not.

2. The Ironically Invisible Dimensions of Visible Teaching Strategies

Most educators believe at some level that teaching fuels learning. The Carnegie Foundation's work on legal education and other fields put that assumption on the table and inquired more deeply "how"? While many prior studies and reports such as the ABA's *MacCrate Report*[46] endeavored to push law schools to incorporate fresh content and emphasis that exposes students to "skills and values" as well as content knowledge, the Carnegie Foundation's efforts put "pedagogy," the act and theory of teaching, in the forefront in a way that has been absent before.

A particular guiding question for each of the Carnegie Foundation studies of professional education concerns the existence and characteristics of distinctive "signature pedagogies" in each of the disciplines studied. Lee Shulman has used the term "signature pedagogy" as a way of spotlighting the characteristic approaches to teaching that are widely adopted by instructors and programs across a field of professional education, generally reflecting an alignment of theory and practice in the given field, and possessing unusual power to shape understandings of the nature of knowledge and professional roles.[47] Shulman argues that signature pedagogies have several dimensions, including a surface structure (the action of teaching and learning), a deep structure (based on assumptions about how best to teach), and an implicit structure (reflecting judgments about attitudes, values, and dispositions in the field). In addition, signature pedagogies tend to have a "shadow" side, reflecting what it leaves out.

Shulman has attributed the power of "signature pedagogies" to several factors. Typically they involve pervasive repetition and routine, resulting in "habits of mind" that can be employed, almost automatically, when engaging in complex problem solving. They generally require students to perform in role, necessitating activity, interaction, and visibility within a "public" setting in front of others, thereby fostering accountability. They require students to grapple with uncertainty in order to develop professional judgment. Often the emotional stakes are high (coupling excitement with anxiety), resulting in experiences that shape students in profound ways affecting their values and dispositions as members of a particular profession.

---

46. ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, REPORT ON THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter THE MACCRATE REPORT].

47. Lee S. Shulman, *Signature Pedagogies in the Professions*, DAEDALUS, Summer 2005, at 52-59.

Certainly this description of "signature pedagogy" will bring to mind the experience of beginning law students in first year classrooms where instructors employ the "case-dialogue method." This approach, well depicted in *The Paper Chase* [48]and *One-L,*[49] has all the characteristics described by Shulman in more general terms. Teachers who employ this method in one of its varying forms introduce students to dialogue reminiscent of the question-answer rhythm found in courts and legislatures, using authentic legal artifacts (cases and statutes). The dialectical approach allows instructors to encourage (and indeed force) students to engage with the inherent uncertainty at the heart of many problems that come before the courts. This approach also fits remarkably well with the development of critical thinking, drawing students through the full range of educational objectives articulated by Benjamin Bloom (knowledge, comprehension, analysis, application, synthesis, and evaluation).[50] It is also wonderfully adept in allowing instructors to make student thinking visible, then coach students to the next level, before fading away when students can stand on their own. The "case-dialogue method" also conveys implicit values and assumptions for good or ill: who is visible, who gets to speak, what counts as authority, what forms of conflict resolution (most often litigation) is the norm. Student experiences with the "case-dialogue method" in the first year of law school track very closely with the description of activity, visibility, and anxiety noted above.[51]

For all the power of the "case-dialogue method," it has important downsides, however. It is an excellent tool for developing analytical abilities, but it is not particularly well suited to developing other "practice-oriented" skills, opening up issues of professional identity and values, or fostering a critique based on social justice. It is also so powerful that it raises the adrenalin level of students significantly. Once they've mastered the technique, they can grown bored with repetition that extends beyond the first semester and on into the second and third years. It has no obvious means of building important progression in what and how student learn. It is also well suited to engaging students in large classes but less so in smaller discussion settings, seminars, and clinics. In these respects, the "case-dialogue method's" shadow side is apparent. Legal educators

---

48. JOHN JAY OSBORNE, JR., THE PAPER CHASE 18-21, 44-46, 56-58, 122-24, 206-08 (1970).

49. SCOTT TUROW, ONE-L: THE TURBULENT TRUE STORY OF A FIRST YEAR AT HARVARD LAW SCHOOL 40-42, 49-53, 60-63 (1977).

50. TAXONOMY OF EDUCATIONAL OBJECTIVES, HANDBOOK 1: COGNITIVE DOMAIN 62-197 (Benjamin Bloom ed., 1956) [hereinafter BLOOM'S TAXONOMY].

51. For more full-blown discussion of the "case-dialogue" approach to teaching, see *infra* Part II.C.4.

need to think about fresh variations and new types of "signature pedagogies" that can function well in varying contexts such as these.[52]

C. *Remember the Power of Naming: On "Thinking Like a Lawyer" and the "Case-Dialogue" Method*

Legal educators have long possessed the power of naming the most crucial lessons learned in law school, using the phrase "thinking like a lawyer" to encapsulate the challenges that face generations of law students. In a sense, the legal academy has embraced this trope as its own core identity (much as Rumpelstiltskin reveled in the power of his own name). Critiques of this formulation often claim that the first year of law school has little to do with the "thinking" of "real lawyers" whose daily work (and related "thinking") more often involves client relations and "practical skills" rather than esoteric debates about the meaning of appellate cases.[53] Although there is evident need to expand the scope of instruction to embrace much more than appellate cases, as discussed below, there is a real need to appreciate what is encompassed by the conceit "thinking like a lawyer" before its potent power can be given its due and needed reforms can be approached without jettisoning some of the most effective aspects of legal education as it currently exists.

1. "Thinking Like a Lawyer": A Literal Approach to a "Wicked Problem"

Entering law students are used to thinking about academic courses in terms of content and subject matter. Thus, most first year students seek to master content-related principles of property or contracts or torts, expecting clear and cogent explanations from their professors about what those principles might be. They generally believe that they know how to think and have been successful in that academic venture. They may not know much about lawyers and what they do, but they expect that content knowledge about the work of lawyers can likewise be imparted and absorbed as other information has been throughout their academic lives to date. Significantly, however, "thinking like a lawyer" is both a prerequisite and a co-requisite to engaging with the content of law courses.
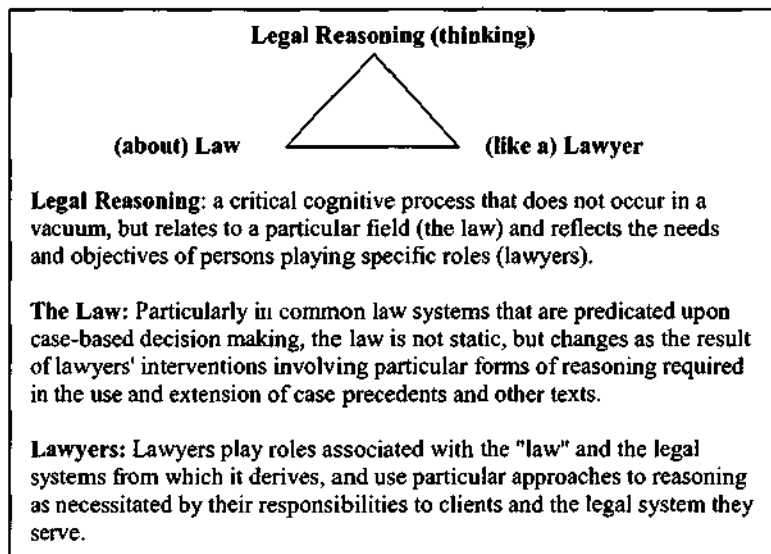
---

52. *See, e.g., infra* text accompanying notes 162-65.

53. Recent work by Marjorie Schultz and Sheldon Zedek, involving interviews of lawyers, judges and others, demonstrates the wide array of skills required for effective work as a lawyer. *See infra* text accompanying note 155. The "Socratic" method and the "case method" used in the first year of law school as a means of teaching rigorous analytical thinking have each been criticized as well. *See infra* text accompanying note 79.

Mastering "thinking like a lawyer" is itself a "wicked problem" that has all the challenges associated with problems of that sort. The problem itself ("thinking like a lawyer") is not easily analyzed by novices, there is a "no stopping rule" rather than a clear point of attainment, the problem has multiple dimensions that are interrelated, easy solutions are not readily available, and resolution (attaining competence) is rarely a linear process but rather one that involves a good deal of trial and error in working with solutions, not just the "problem" itself.

While a literal approach to "thinking like a lawyer" is not sufficient to unravel these dilemmas, an initial depiction of key challenges is a necessary first step. As the figure below demonstrates, even on the surface the notion of "thinking like a lawyer" has more significance than most beginning students appreciate. It involves a *certain* kind of thinking (a form of reasoning that is situated in the legal context reflecting the needs and purposes of lawyers). It involves *certain* kinds of content and dynamics (case-based precedent, a changing society, and the interventions within the legal system). It also involves *particular* players (lawyers) with associated roles, responsibilities, and norms.

Figure 2: "Thinking Like a Lawyer": Basic Facets

Legal Reasoning (thinking)

(about) Law **(like a) Lawyer**

Legal Reasoning: a critical cognitive process that does not occur in a vacuum, but relates to a particular field (the law) and reflects the needs and objectives of persons playing specific roles (lawyers).

The Law: Particularly in common law systems that are predicated upon case-based decision making, the law is not static, but changes as the result of lawyers' interventions involving particular forms of reasoning required in the use and extension of case precedents and other texts.

Lawyers: Lawyers play roles associated with the "law" and the legal systems from which it derives, and use particular approaches to reasoning as necessitated by their responsibilities to clients and the legal system they serve.

In short, "thinking like a lawyer" is a predicate to knowledge about the law, as well as a new way of knowing. It reflects a new theory of knowledge (epistemology), with daunting challenges for students who typically do not even realize that they have a theory of

knowledge. "Thinking like a lawyer" resonates in some ways with the kind of "thinking" associated with other fields of endeavor,[54] but its contextual aspects mean that even good "thinkers" trained in other fields must face fresh challenges as they begin the study of law. Happily, others have passed this way before, and important insights about the multiple dimensions of this "wicked problem" can be gained through their assistance, much as Millie succeeded in discovering Rumpelstiltskin's true name with the help of her friends.

2.   "Thinking Like a Lawyer": Lessons from Faculty and
     Students

As part of the Carnegie Foundation for the Advancement of Teaching's study of legal education, researchers sought a deeper understanding of "thinking like a lawyer" as understood by faculty and students at sixteen representative American and Canadian law schools where site visits were conducted in the 1999-2000 academic year.[55] In the course of interviews and focus groups, law teachers,

---

54.   For a fascinating comparative study of "thinking" that characterizes those educated in different academic disciplines and professional fields, see JANET GAIL DONALD, LEARNING TO THINK: DISCIPLINARY PERSPECTIVES (2002) (discussing physics, engineering, chemistry, biology, psychology, law, education, and English literature). The author posits a working model of thinking processes including description, selection, representation, inference, synthesis, and verification, *id.* at 26-28, and uses that framework to compare instructional challenges and strategies. She also compares challenges to instruction across disciplines, *id.* at 286-87; for example, she notes that law involves challenges in building a framework for legal knowledge, developing legal analysis skills, and investigating values, while the study of physics requires development of a mental model of learning, improving the ability to problem solve, and enlightening students about successful learning. The Carnegie Foundation for the Advancement of Teaching's comparative studies of various forms of professional education also highlight differences in thinking expected in various fields. *See, e.g.,* SHERI D. SHEPPARD ET AL., EDUCATING ENGINEERS: DESIGNING FOR THE FUTURE OF THE FIELD 31-54 (2009) (discussing "knowing that" and "knowing how," including learning fundamental concepts, articulating concepts in mathematical terms, applying concepts, generating models, analyzing problems, and developing engineering intuition).

55.   Because of the emphasis on teaching and learning that was central to the Carnegie Foundation's "program on preparation for the professions," the research team sought to develop a richly descriptive and carefully analytic portrayal of key practices and underlying perceptions that lie at the heart of legal education. The study was designed to tap and integrate insights drawn from several different types of observers and informants (the multi-disciplinary research team, faculty, students, deans and senior staff), gathered through a range of means (class observation, intensive interviews, focus groups), at a cross-section of sixteen diverse law schools in the United States and Canada. The schools were selected with an eye to a number of key variables, including size, selectivity, geographic location (including region, and urban versus rural), institutional type (public versus private, religiously-affiliated versus secular, stand-alone versus university-affiliated), mission, program characteristics (e.g., day and evening divisions and special concentrations), faculty and

first year and advanced students were asked to respond to a simple question: "what does it mean to 'think like a lawyer'?" Their comments centered on the three major facets of "thinking like a lawyer" discussed above – the process of reasoning, the nature of the law, and the role of lawyers. In discussing these important topics, they traced several important themes. "Thinking like a lawyer" involves the following essential attributes:

Recurrent use of questions that are gradually internalized.

Structured forms of reasoning that become routine.

New concepts of "knowing" that integrate uncertainty at their root.

Exposure to a limited universe of law and the legal system.

Development of "legal literacy" involving careful reading, mastery of vocabulary, and conventions for textural interpretation.

Treating professional roles as a given, rather than exploring their depth.

Exposure to professional norms to foster adaptation without confronting student views.

In important ways, these added nuances build upon the basic framework of "thinking like a lawyer" outlined above. Each of these techniques functions to "domesticate doubt" and to reduce the unsettling uncertainty that lies at the heart of legal education and the practice in law. In a sense, they reflect legal education's effort to

---

student characteristics, and graduates' career paths. In all, seven geographic regions are represented (New York/Northeast; Southeast; Central; Plains; Southwest; California; Canada). An effort was made to include both a more elite and a less elite school in each region, as well as schools of contrasting size. Roughly half the schools are private and half public (including approximately equal numbers of law schools at elite public "flagship" universities and at "second" state law schools). Pairs of schools of different types were in some instances deliberately selected from the same urban area to allow comparison, while other schools were paired within particular regions in order to explore the implications of recent litigation or ballot initiatives limiting affirmative action. Three schools were religiously affiliated (with religion playing varying roles), one was a historically black school, and two were relative newcomers to legal education. Three had large part-time programs, three had substantial graduate programs, and three had mandatory clinical requirements. Graduates of approximately half the schools gravitated toward corporate practice in large urban areas, while graduates of other schools gravitated toward a wider range of jobs. The schools visited included the following: Northeastern University (Boston), City University of New York and New York University (New York City), North Carolina Central University (Durham, NC), Vanderbilt (Nashville, TN), Indiana University-Indianapolis (Indianapolis, IN), Notre Dame (South Bend, IN), Hamline (St. Paul, MN), University of Minnesota (Minneapolis, MN), University of Texas-Austin (Austin, TX), University of New Mexico (Santa Fe, MN), California Western (San Diego, CA), Santa Clara (San Jose, CA), University of California-Berkeley/Boalt Hall (Berkeley, CA); University of British Columbia (Vancouver, British Columbia, Canada), and Osgoode Hall (York University, Toronto, Canada).

"tame" the "wicked problem" facing students at the outset of their early days within the legal profession. However helpful these initial techniques are to introduce students to fundamental ways of knowing the law, they are insufficient to prepare students fully for professional practice, as discussed more fully below. First, however, it is important to unpack the lessons these faculty and students have for those encountering the "wicked problem" of "thinking like a lawyer" at the outset of their careers.

a. Learning About Reasoning

Legal reasoning lies at the heart of "thinking like a lawyer" and of the world of law. It is, as one student observed, the conceptual "Mount Everest" that must ultimately be climbed. Faculty and students described legal reasoning in a variety of terms, but generally emphasized the importance of attention to questioning and the internalization of the questioning process, consistent with the observations of John Dewey.[56] Legal reasoning also involves a stylized analytical process with which students must become increasingly familiar. Finally, legal reasoning is about "reconstructing knowledge" in the sense of reshaping understanding of raw materials within a framework distinct from their original state. Each of these aspects of "thinking like a lawyer" deserves consideration in its own right.

i.   Posing Questions

Both faculty and students universally associated "thinking like a lawyer" with asking questions and engaging in dialogue, Socratic or otherwise. Faculty members described the questioning process very straightforwardly. Students must "read and ask questions the way lawyers do to find the law," said one. Another stressed the importance of questioning to his educational philosophy: "I take students through a line of questioning and ask 'why' repeatedly" even though that approach might be seen as "intimidating and harsh" and even though students increasingly seem to "resist that type of approach." He continued, "it's not pleasant to meet that kind of resistance," and said that students claimed that "no one else teaches that way," that they "are not used to dealing with uncertainty" such as this. Said another professor, "I ask questions that probe. You can't teach 'thinking like a lawyer' directly, but [do so] by providing students with practice and repetition."

Other professors emphasized the role of dialectic. Said one faculty member, "class is a 'mind game' since there is always a counter . . . 'what's weak in what you just said?'" Another explained

---

56. *See infra* text accompanying note 67.

that he would break down problems for students' consideration, asking questions like "[i]magine that you were the plaintiff's lawyer and need to resolve his problems, how would you do it?" then "tak[ing] students back to the time before the case was decided and ask[ing] them how they would have handled it." Yet another described the questioning process as "challenging assumptions." Still others stressed the importance of helping students to be aware of the necessity of "presenting both sides" and developing "comfort" with the implicit "uncertainty" in this situation. Said another: "The hardest thing [about thinking like a lawyer] is there are no answers . . . . [Students] need to trust it's not 'hide the ball,' [but rather] an ability to argue both sides against the background of precedent or statutory fact patterns."

The process of questioning and the expectation that they see "both sides" also loomed large in students' minds across the board. Numerous students from many schools stressed the importance of seeing "both sides." One, describing a favorite professor, explained that he "makes you answer [the question], then slips over and sees [it] from the other side." Another, responding to a question about when he realized what legal thinking is, reported that he'd learned it on a midterm examination: "there's two sides to every story . . . you have to see the bigger picture."

Students seem to have derived additional lessons, however. The process of questioning is a continuing one. "Professors are continually challenging, asking 'why,'" said one student whose observation was met with a classmate's rejoinder "you have to keep asking questions even if you're right." At another similar school, a first year student explained that she was learning that legal disputes "are complex situations in which both [parties] thought they were doing right; it's not black or white or clear cut; there are so many circumstances that trial attorneys must consider them all." Such lessons can be taken to an extreme. Said another student: "[professors] stress that there's not a right answer; [on exams] you can write what you want as long as you support it." Observed another, elsewhere: "[when it's] just analysis [there's a] danger that you can objectify [things] so you an argue any side and maybe lose your belief system."

Both faculty and students thus portray the process of "thinking like a lawyer" as one that faces up to uncertainty forthrightly. Indeed, such "thinking" is a process that endeavors to create uncertainty routinely by demanding that questions be pursued even when answers appear clear, and that every seeming answer be critiqued with an eye to a contrary viewpoint. In a sense, then, the questioning and dialectical process implicit in "thinking like a lawyer" serves to immunize students from their fears of uncertainty by making it a necessary part of the legal system and providing early

exposure and repeated booster shots.

<div align="center">

ii.   Developing a Routine

</div>

Faculty members and students likewise agreed that "thinking like a lawyer" introduces and drills students on a particular form of reasoning associated with American common law. Like judges and lawyers, students must confront the inherent uncertainties associated with this legal system by distilling legal principles from decided cases, arguing for their application in new situations, and synthesizing a broader understanding of the law. In the name of "thinking like a lawyer," law teachers prompted students repeatedly to engage in certain intellectual tasks, taking into account competing points of view. By doing so, they helped students develop standard routines through which to confront a variety of uncertainties as a matter of course. Such routines are variously described in terms of a sequence of intellectual tasks that must be undertaken, a process by which these steps are performed, or a set of rhetorical practices associated with "argumentation."

Responding to the question "what do you mean by 'thinking like a lawyer,'" some faculty members itemized the elements associated with legal reasoning. Said one: "Thinking like a lawyer" entails "skills in legal analysis: case analysis, synthesis, deduction, induction, and analogical reasoning." Another described legal reasoning as "the legal paradigm": "spotting and applying rules, recognizing corollaries, spotting holdings, for some working with public policy, and recognizing logical syllogisms." Another said that he initially tells students that they "must identify the issue, identify the rule, apply the rule, and reach a conclusion" (the "IRAC" model used in many legal writing programs), but emphasized that their level of analysis must in time be expanded. Another faculty member almost apologetically acknowledged the "formalistic, instrumental" nature of this approach to "thinking," but said that his school had found it essential to address the matter explicitly in view of the backgrounds and preparation of its students, rather than assuming that students were familiar with such cognitive routines.

Students in numerous cases echoed their faculty members' comments. A common metaphor emphasized the need to "break down" problems in sequential order. Said one student, "it's 'step thinking' in anything you approach; breaking things down." Another said "you have to aim at 'kernels' of ideas." She drew a colorful analogy: "it's like *The Exorcist* . . . the 'old priest' sticks to the ritual, focused on what the exorcism is about. [So] how do you solve a legal problem? Step one, step two . . . and so on." Describing the first year experience, an advanced student explained more concretely that her first year professors had been "making sure that you are reading the

cases, walking you through the facts," and requiring students to "pinpoint what the actual issues are ... [then] go through the rationale of the court."

Other faculty members spoke generally of the intellectual processes required of students, or linked those processes with various steps along the reasoning chain, often using general rather than law-specific terms. Students need to "be able to compare and contrast and synthesize ... material," said one, emphasizing the need for systematic approaches or their "thinking ... can get strayed." An articulate professor spoke passionately about problems her students had "with building schematics" and stressed that she emphasized the need "to analyze car parts, then put them all together again so the car can run." Other faculty members explained that students are asked to define and spot issues in scenarios borrowed from the real world in order to trigger their "intellectual excitement" or to bolster their ability "to take a set of facts and place it substantively on the legal map." Students in turn acknowledged that thinking must be done "logically," but with attention to "seeing between the lines."

As part of the effort to create a structured routine of inquiry and disciplined processes by which that inquiry can be pursued, common problems tend to arise. Several faculty members described difficulties faced by students in discerning relevance; problems that might arise in working with facts, textual interpretation, argumentation, or analogies; and applying legal principles to hypothetical facts. They noted the challenges presented as students work to distill a controlling principle from multiple arguments or rules in single or multiple cases, as well as the difficulties students have in deriving an "appropriate level of abstraction." The balance between the abstract and the specific in the reasoning process is not always easily struck. Students at some schools described the legal reasoning with which they had become familiar as "distilled," "artificial," and "unreal." There was an overall sense of satisfaction, rather than mystery or frustration, in such characterizations, however. One student explained that he enjoyed legal reasoning since it "is framed objectively ... with emphasis on formally structured arguments," a "refreshing [process] compared to the openness and 'mushiness' of undergraduate experiences."

At times, the routines of reasoning expected of students were depicted in terms that seemed both global and quite local, referencing conventions of rhetoric in which faculty took great pride. For example, the use of the term "argumentation" to describe an encompassing process of reasoning seemed to have distinctive, powerful connotations, particularly to faculty in certain sub-specialties such as constitutional law or law and philosophy, or those long-associated with the discourse at particular schools. Thus, at one

such school, several faculty members emphasized the importance of "conventions of legal reasoning," defined by one as "types of arguments, textual, policy, structural, and style." A colleague on the same faculty who teaches constitutional law noted:

> When the question is "how do you argue a constitutional issue," I try to introduce an oral argument in class and try to introduce the different modes of legal argumentation. I would try to suggest to students that styles of legal argument are also modes of reasoning and analysis. Understanding these would help them think their way through resolution of tort problems. I would emphasize the problem solving side of the field, that there are many points of view. Undoubtedly, one's political sympathies are vividly engaged in reading any constitutional case law but the best discipline is to give full weight to opposing arguments.

A professor of constitutional law and federal jurisdiction elsewhere used similar terms to describe the importance of argumentation while driving home the role of formal reasoning processes in creating a sense of self-discipline:

> The basic skill is just logic. It's amazing how long it takes [students] to reason from premise A to premise B to Conclusion C. Being able to sort through different kinds of arguments. Which ones are appropriate, which ones are persuasive, which ones are dependent on evidence. How to make a persuasive argument. It doesn't have to be legal. But just being able to put together a persuasive argument that doesn't wander, doesn't depend on implausible things that don't necessarily go with their beliefs. I just taught a course in Federal Jurisdiction and we read a case that is clearly wrong and we all agree that it is wrong. Then we read a second case in the series and that is wrong, too. So I made them assume that the first case was right, then is the second case still wrong or not. They didn't want to do it, but [it's useful] just forcing them to think hard about things they already think they know something about, or don't care about or have strong feelings about. I think that is very important. Con Law was harder. They thought it was all political and they already knew what they thought and they thought they were smarter than the Supreme Court. In Civil Procedure, I may disagree with it, but I need to understand it anyway.

When asked how he measured student progress in learning to "think like a lawyer," another professor said, "my best students can construct arguments like you [a senior faculty interviewer] would." Yet all metaphors may have their limitations, depending on what students are prone to hear. Said a faculty member at another school, "students don't know how to think through anything analytically . . . it's hard for them to do more than argumentation," suggesting perhaps, that students may at times think they must "argue" even though they have yet to appreciate the complex legal connotations of

that term.

It is thus apparent that developing routines for legal reasoning is a critical part of "thinking like a lawyer" from both faculty members' and students' points of view. Faced with novel cases and problems, familiar steps, processes and rhetorical conventions can play a crucial role in grappling with the uncertainty that is inherent in the structure of the common law.

b. Reconstructing Knowledge

While faculty members are quick to ask questions and lead students through analysis day by day, they often do not see or grapple with another underlying form of uncertainty that preoccupies students entering law school. Students repeatedly described their struggle to mesh prior ways of thinking and knowing with the approaches they were being asked to embrace. Some said that in time they had made a deep and mysterious "phase shift," yet the nature of this fundamental transformation proved difficult to explain. A deeper exploration of this relatively invisible form of uncertainty is accordingly warranted here.

Faculty members asked to compare "thinking like a lawyer" to other forms of thinking sometimes equated the concept with sophisticated "critical" thinking in many intellectual spheres. Said one: "Why do we call it 'thinking like a lawyer?' Don't all professions do critical thinking?" Another said that the key to teaching "thinking like a lawyer" is "educational thinking" that endeavors to stimulate critical and rigorous thinking in ways that could inform strong undergraduate and graduate courses anywhere. To say that "thinking like a lawyer" requires a form of critical thinking is not, however, to explain the nature of "critical thinking" or to appreciate the steps by which the capacity for "critical thinking" is formed.

Some professors hinted at these additional dimensions of the issue, suggesting that "thinking like a lawyer" and critical thinking more generally entail a different appreciation for what it means to "know" something, and different conventions for demonstrating what is in fact known. A faculty member at a Canadian school explained that "thinking like a lawyer" required development of analytical skills not previously understood by undergraduates: "Our goal is for them to think critically about what they're doing. Don't just take the law as the law . . . . It will make them more versatile . . . . [Get] them to question assumptions." Another professor, recently entering the academy after significant practice experience, described differences in teaching argumentation to law students and journalists: "[There are] constraints on how legal decision makers make decisions . . . . [It's] not persuasive to just sound good. [Lawyers must] overcome skepticism, understand it, document your reasoning, and prove every

step."

Students asked to comment on how "thinking like a lawyer" compared to other approaches to thinking they'd encountered offered a range of interesting insights. Some saw common objectives that link legal thinking and thinking associated with other professional fields. Those with experience in engineering stated that each discipline involved problem solving, analysis, and testing of possible solutions. Others, such as a student with a Ph.D. in the biological sciences and a student who had worked as an investment analyst, emphasized commonalities such as the need for analysis, synthesis, and "critical thinking."

Beneath these similarities, others saw significant differences, reminiscent to those noted by the faculty members quoted above. Some emphasized the inherent uncertainty of knowledge associated with the law. Said a scientist: "the material [in law] is not that hard, but science is black and white and law is gray . . . I'd been used to thinking there was one answer and making sure to put that down on paper." Others spoke of the way in which what counts as knowledge is constructed. A doctor explained that medicine and law are very different: "There are right answers in science. With law it's a matter of making a case." Said another, "law is floaty" but grounded compared to the "openness and mushiness of undergraduate experiences." A former history student explained that "it's great to be in a class where your personal perspective doesn't get the emphasis," while a student with a Ph.D. in philosophy observed that his prior work had "developed skill in 'tearing down arguments' while law school spent lots of time 'trying to find out how to use this kind of reasoning.'" Another, who had studied public administration, commented that law lacked the emphasis on cooperation he had found in that field. Still others said that legal thinking lacked depth.

These subtle distinctions in the nature of knowledge and the ways in which knowledge is constructed seem illusive and in some respects hard to comprehend. Yet numerous students described the process of learning to "think like a lawyer" in terms that suggested they'd experienced a significant and illusive "phase shift" in the nature of their thinking. This realization that something had "clicked" is difficult to communicate and is often appreciated only in retrospect. One student explained that, for him, this shift occurred when talking to a non-lawyer on the phone about a contract, while another described it in more general terms:

> "[Thinking like a lawyer] is a non-knowledge based system of learning . . . . In law, you can't know everything. Every client has different facts [and you need] different approaches and theories. You can't know everything. It would be overwhelming to know everything. Learning to think − . . . It's a little weird, no doubt . . . .

It's really a process, one you go through over and over to develop facility. I have more respect for that than when I first got here.

What are these students getting at, and how does it relate to the sorts of reasoning that were earlier described? Students' growing appreciation for the complex nature of knowledge (it is not absolute, is associated with evidence or argument, and depends on more than one's personal view) parallels the findings of leading theorists who have studied intellectual development among college students and traced evolving relationships with certainty and doubt.

William Perry is a well-known theorist who conducted longitudinal studies of male Harvard students and developed a multi-staged model of intellectual development that emphasized the structural aspects of knowing and valuing.[57] Perry traced individuals' evolution from early stages (when they saw the world in terms of right and wrong and expected authorities to convey truth) to intermediate stages (when they recognized diverse views and a limited area in which uncertainty prevailed) to later stages (when they recognized the importance of context in shaping meaning, the role of the self in constructing meaning from among alternatives, and the necessity of making commitments based on one's own sense of identity and values). Feminist theorists such as Mary Belenky and her colleagues likewise mapped transitions in epistemological beliefs as women moved from the belief that knowledge originates externally and is to be received from external authorities to later recognition that knowledge is constructed in context by the knower herself.[58] Another noted theorist, Marcia Baxter Magolda, found that college students gradually moved from belief in "absolute knowing" through a series of transitions to a growing recognition that knowing is "contextual" could be discerned.[59]

The "reflective judgment" model of Patricia King and Karen

---

57. *See* W.G. PERRY, FORMS OF INTELLECTUAL AND ETHICAL DEVELOPMENT IN THE COLLEGE YEARS: A SCHEME (1970). For a comprehensive discussion of Perry's and others' theories, see 2 ERNEST T. PASCARELLA & PATRICK T. TERENZINI, HOW COLLEGE AFFECTS STUDENTS: A THIRD DECADE OF RESEARCH 34-36 (Jossey-Bass, 2005).

58. *See* MARY FIELD BELENKY, BLYTHE CLINCHY & NANCY GOLDBERGER, WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE AND MIND (1986); *see also* Carrie Menkle-Meadow, *Women's Ways of Knowing Law: Feminist Legal Epistemology, Pedagogy, and Jurisprudence, in* NANCY GOLDBERGER ET AL., KNOWLEDGE, DIFFERENCE, AND POWER: ESSAYS INSPIRED BY WOMEN'S WAYS OF KNOWING 57 (1996) (discussing alienation in traditional large Socratic classrooms and offering insights about pedagogical approaches with insights from feminist theory).

59. *See* MARCIA BAXTER MAGOLDA, KNOWING AND REASONING IN COLLEGE: GENDER-RELATED PATTERNS IN STUDENTS' INTELLECTUAL DEVELOPMENT (1992); *see also* PASCARELLA & TERENZINI, *supra* note 57, at 38-41 (describing ways that college students "make meaning" including absolute knowing, transitional knowing, independent knowing, and contextual knowing).

Kitchener is of particular relevance, since it concentrates on the reasoning and justifications used to resolve ill-structured problems and is rooted in extensive longitudinal studies involving individuals from high school to middle age.[60] Individuals move from early stages (in which they view knowledge as simple and concrete) through intermediate stages (in which they recognize that individuals cannot know with certainty, justify knowledge on the basis of abstractions with links to evidence and arguments in support) to "reflective" stages (in which they recognize that knowledge is uncertain, and that they must actively construct meaning after evaluating possible justifications, multiple perspectives and expert views). College students generally cluster at the intermediate level, having just begun to grapple with the relationship between uncertainty and knowledge, and as yet unaware of the inherent uncertainty of knowledge itself.

The student comments previously quoted suggest that a deep and fundamental shift occurs in the nature of knowledge and knowing in conjunction with the development of advanced reasoning routines, a shift that is recognized only in retrospect and rarely clearly stated or understood. Knowledge is no longer simply received from experts, but must be constructed, since law is by its nature "gray." Knowledge must be created with reference to evidence and argumentation, not just through one's personal opinions. The developmental trend that is thus apparent is consistent with research in other contexts that suggests that such epistemological phase shifts may be closely related to development of capacities for abstract forms of reasoning, dissatisfaction with existing beliefs, and identification of intelligible and useful alternatives that can be linked to earlier conceptions, motivation and context. Few faculty or students are conscious of their epistemological beliefs, let alone of ways in which they may change. Developmental struggles are therefore generally invisible and poorly articulated at best. Recognizing and explaining that students must confront uncertainty on this deeper and less obvious level may prove an important step in helping them more readily come to terms with the insistent questioning and sophisticated routines of reasoning associated with studying law.

---

60. PATRICIA M. KING & KAREN STROHM KITCHENER, DEVELOPING REFLECTIVE JUDGMENT: UNDERSTANDING AND PROMOTING INTELLECTUAL GROWTH AND CRITICAL THINKING IN ADOLESCENTS AND ADULTS (1994); *see also* PASCARELLA & TERENZINI, *supra* note 57, at 36-38 (summarizing theory).

c. Learning About "The Law": Inhabiting the
Territory and Legal Literacy[61]

Some students enter law school feeling comfortable in the knowledge that they have encountered the law and the legal system in earlier courses in business or constitutional law, prior work in banking or teaching, personal experience with divorce or small claims court, or extracurricular encounters with John Grisham, *The Practice* and *Ally McBeal*. Their first direct exposure to the world of law as portrayed in law school is likely to prove unsettling, for they must learn to inhabit new territory that bears but limited

---

61. For an important empirical study of language and learning in law school classrooms, see ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" (2007) [hereinafter THE LANGUAGE OF LAW SCHOOL]. Mertz's work involved close observation of faculty-student interaction in contracts classrooms across a range of eight law schools with different characteristics. During her extended research on the language and teaching approaches used (and with the benefit of transcriptions of classroom interchanges), Mertz also explored student-faculty differences relating to race and gender. Mertz's principal conclusions included the following points:
- There is a core approach to the world and to human conflict that is perpetuated through US legal language. This core legal vision of the world and of human conflict tends to focus on form, authority, and legal-linguistic contexts, rather than on content, morality, and social contexts.
- This legal worldview and the language that expresses it are imparted in all the classrooms studied, in large part through reorienting the way students approach written legal texts. This reorientation relies in important ways on a subtle shift in linguistic ideology.
- Although apparently neutral in form, in fact the filtering structure of legal language taught to students is not neutral.
- There is a "double edge" to the approach found in US legal language. It offers benefits but also creates problems.
- There is a cultural invisibility/dominance problem in law school classroom interactions, where learning the apparently neutral language appears to have different effects on students of different races, genders, and class backgrounds.
- Although this study finds a shared underlying epistemology imparted in diverse classrooms, it also delineates significant differences on students of different races, genders, and class backgrounds.
- Both in terms of content and form, legal education and the language it inculcates mirror a "double edge" arguably found in capitalist epistemology more generally.

Id. at 4-6.

For an additional study exploring the power of language, classifications, rhetoric, and narrative in the courts and the legal system more generally, see ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000) (reflecting work done in part through the New York University School of Law's Lawyering Theory Colloquium).

resemblance to either Hollywood portrayals or the real world, and to develop a new form of "legal literacy" with conventions previously unknown.

i.   Inhabiting the Territory

When asked the meaning of "thinking like a lawyer," a thoughtful professor of torts answered by drawing an analogy between his teaching in the first year and in an advanced course in canon law. He depicted "thinking like a lawyer" as the key to a new world, the world of law:

> Canon law . . . is an introduction to the oldest legal system in the West. It starts with the Church's understanding of the self, the human person, and marriage. Canon law is applied theology, so we must begin with theology . . . the human person, . . . what is marriage . . . the capacity to marry. I introduce students to a realm of study they've never encountered before . . . I am teaching them to "think like a lawyer."

This world is filled with paradoxes. It contains "fact patterns and problems with which students can identify," said another professor of torts, and "cases rooted in context," according to yet another. At the same time, new institutions and new players are crucial – "law is what happens in courts" and relates to "the way judges examine problems," according to a professor of constitutional law at another institution. Students required to "think like lawyers" must understand "principles" and substantive topics, as well as "procedural settings" according to law professors. The new world of law is not only grounded in facts, problems, players, principles and procedures, however. "Law is an artificial construct," said another professor, noting that the choice of construct has been debated throughout the years, for example, by those who believed that law is properly considered a "science" and those of a "realist" persuasion who found it all too human at root. Still other faculty used more dynamic metaphors. Said several, "thinking like a lawyer" involves acquainting students with the "system" and its "operation" (leaving these notions undefined). As another faculty member explained it: "It's like figure skating . . . unless you have the skill, you cannot do freestyle. Unless you understand how the system works, you cannot deal with the real issues."

Strikingly, relatively few students seemed to associate "thinking like a lawyer" with this notion of entering a new world. First year students who did so described it in straightforward terms. One student explained that law schools see "law as developing over time, done by people educated in a different way," one in which attorneys "can't say it's like a movie," but in which "proof is needed and a conclusion." Another first year student described the legal world as

one in which "rules change," so that a professor's advice not to "learn the speed limits" made sense. Advanced students seemed to have increasingly sophisticated views of the legal world, noting that it includes many different vineyards, practice-specific areas such as "working with the homeless or working with trade agreements." "It organizes a lot of things," but is marked by "instability." "It is a solution space" in which to "ask a lot of questions."

This relative silence contrasted sharply with students' descriptions of their "memorable educational experiences" while in law school. Many portrayed compelling professors and experiences in their classrooms, being called upon and surviving, or learning deep lessons such as "nothing's simple," "be prepared," "appreciate another person's point of view," "the law does not provide clear answers." Yet the most persistently and powerfully developed theme, expounded in vivid detail, related to their actual experiences with lawyers and the law through practice-oriented courses, clinical experiences, summer jobs, or volunteer contributions:

"I got to go to Cuba for two weeks . . . [to the] University of Havana's women's rights center . . . and [saw] political stuff and how government works."

"I represented undergraduates in administrative hearings about workfare requirements."

"I learned how to pick a jury."

"I worked with the NAACP [Legal Defense Fund] on capital punishment cases. . . and went to Georgia to do field work about a client on death row."

The muted impressions of classrooms and casebooks and these lively depictions of direct experience with the legal system suggest one of several paradoxes associated with "thinking like a lawyer." Over the past century, law teachers and law schools have focused the first year of legal education on common law courses that emphasize case analysis using "casebooks" filled with appellate opinions, organized in ways that give intellectual structure and a "canon" to the field. At the outset, according to Langdell's conception, case collections provided direct source material about the law's operation in quantities that surpassed the library's capacity, enabling professors to show students how to derive and test relevant principles while posing questions about tactics and strategy. Legal historians have noted that Langdell's approach had an additional virtue, that of distilling down the volume of cases to be studied at a time when an increasing number were being printed and indiscriminately flooded the offices of lawyers and apprentices who sought to learn law on the job.[62] In an important sense, the case

---

62. WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN

method, and "thinking like a lawyer" with which it is associated, sought to focus the educational process by keeping students' attention riveted on a relatively narrow legal realm that by its nature is artificially constrained. This commitment to constraint has the effect of introducing greater certainty since the relevant law is "the law of the course" rather than the infinitely more expansive law found in the actual professional world.

Paradoxically, the very fixity and certainty of the circumscribed legal world associated with "thinking like a lawyer" creates other types of uncertainty. Students' eagerness to experience a real life in the law is held in abeyance, giving rise to apprehension about whether they can really have a positive impact and help actual clients, and whether their struggles and sacrifices during law school are worthwhile. Some students find the legal world encountered in many courses to be patently false and imbalanced as a matter of common sense, and feel they are thrown off balance as a result. Said one eloquent student: "we're learning law by taking apart cases," focusing on "what were the failures," and "using wrecks to find out. It's like teaching a dog that it's wrong by hitting it with a newspaper, not teaching it when it's right." Seemingly, each of these concerns could be addressed within the rubric of "thinking like a lawyer," by continuing to rely on many carefully chosen "problem cases" that facilitate development of structured reasoning, while explicitly integrating modest real world experiences during the first year and "case studies" that illuminate best practices of various sorts. Yet such strategies are relatively uncommon, reflecting a preference for the more certain confines of casebooks that faculty members know well.

d. Developing Legal Literacy

Mastering a particular form of reasoning or learning about "the law" cannot be accomplished without developing an appreciation for legal discourse, as this thoughtful professor explained:

> There are two components to this. One is simply teaching students a high level of analytical skills that can be transferable to almost any kind of human activity. One reason why lawyers are prominent in the society is that other disciplines don't teach a high level of analytical skills. So, a lawyer is often the only person who is really ready to take something apart in a very precise way . . . . The other aspect of thinking like a lawyer is the exact opposite. That is, socializing students in the way lawyers engage in discourse about problems (as opposed to a physicist or sociologist). This happens through discussing cases, particularly in the first year, because the judges are getting the students used to the way lawyers talk about,

---

AMERICAN LEGAL EDUCATION 104-07 (1994).

write about problems .... When a student attacks a problem in an examination, and then comes to me and asks why he didn't do very well in the exam, often the answer is, "you may have attacked the problem in an interesting way but you didn't attack it the way lawyers would." If you want to be successful in persuading judges, or if you want to create a document that would be enforced by judges, there is this community of lawyers and that community has a kind of discourse. You have to be part of that discourse to be effective as lawyers. Hence, on the one hand, it's a kind of analytical ability and, on the other hand, it's socializing students to the way in which law is done, the way lawyers engage in discourse.

A substantial number of faculty and students defined "thinking like a lawyer" with reference to "legal literacy," that is, the ability to use legal language and work with legal texts. Certain key topics emerged as particularly important: distinctive forms of reading, novel vocabulary, and unfamiliar approaches to interpretation and expression. In each of these arenas, "thinking like a lawyer" seemed to provide a means of forcing students to learn new ways of working that reduced or cabined the uncertainty inevitable early in their careers.

A thoughtful senior professor of constitutional law and civil procedure described the close relation and progressive nature of students' efforts to learn these key aspects of legal thinking:

> I know I want to teach them to "think like lawyers" but for first years I am teaching them to read cases, to read statutes, just teaching them to read carefully. I don't know how many times I've said, "Did you read the footnote? What did it say? Read it again." They are reading it like they read history texts ... skim for the main points. You can't do that in law. In the beginning I spend more time having them recite a case, going over the statute in detail. Gradually, as they get better at that, I try and get them to compare cases, applying cases, arguing both sides. I also want to get them to think well, to articulate well. That's why I call on non-volunteers. That's why I interrupt them. They are not used to public speaking or to being precise. I try and teach them both. They are going to have to be precise in their speaking and their writing. Even if they aren't litigators, they are still going to have to learn to speak to clients, to partners, and so on. So I want them organized, precise and articulate. I view my job much less as teaching substance. I use the substance as the vehicle.

Other faculty and students spoke in more detail about several of these related points.

i.   Reading[63]

Reading plays a central role in thinking, but it is reading with a difference. One faculty member said she sought to teach students to "read deeply," while another noted that students tend to "skip right over elements" in their reading since they have "not had much close reading as undergraduates." Yet another commented that "careful reading" entails attention both to what a text "says" and "what it doesn't say." An advanced student confirmed that "thinking like a lawyer" entailed learning "how to read *again* . . . and I didn't know what to look for," and acknowledged that the level of skill is something indeed different from that required before. Students also recognized that the pace of reading was different. One noted that it is imperative to "read a lot in a short period of time," while another observed that it is necessary to read so closely that it is possible to "pick out the argument in each paragraph." A thoughtful colloquy between first year students emphasizes the point and the power of careful reading:

> Student 1: You have to read for content, what's important and what's not. It's an ability to look deeply beyond the surface, for better or worse. [In some ways] it's [maybe] defensive.

> Student 2: I agree, you're dead on. It's a way to read cases, case notes, or the newspaper. I begin to appreciate . . . there are intelligent people here, but most people say they start noticing better ways . . . [they see] inaccuracies, they see meaning and truth that lies behind the PR-friendly world.

ii.   Vocabulary

Language itself must be taught and its power appreciated.[64] One professor colorfully described the process: "[students] are like babies learning language; you have to wrap them into it," suggesting the deep significance and educational dynamics associated with acquiring new language skills. A professor at a Midwestern school observed:

> I tell them sometimes that I teach a language and there are words that they ought not to use and words they should use. So I try to make them hear themselves, hear what they are saying and know the effect of their words and the difference it makes in using one word rather than another.

In addition to knowing a new language, and what words should

---

63. For discussions of the importance of reading skills in law students, see RUTH ANN MCKINNEY, READING LIKE A LAWYER: TIME-SAVING STRATEGIES FOR READING LAW LIKE AN EXPERT (2005); THE LANGUAGE OF LAW SCHOOL, *supra* note 61, at 43-73.

64. *See* THE LANGUAGE OF LAW SCHOOL, *supra* note 61, at 17-39 (discussing the role of language in law, society, socialization, education, and legal reasoning).

or should not be used, professors with backgrounds in both philosophy and law emphasized that students must also understand that "legal thinking appears to [involve] ordinary language, but is in fact a transforming medium," with words carrying unusual freight. Another professor made a similar point but from a critical perspective, emphasizing the need for new language to be created or old language to be freshly understood. She explained that she is "interested in having the students develop the language to discuss race and racism. [They can] argue for whatever position they think is appropriate. I would like them to have the language to do that."

Another law teacher explained that the weight of learning a new language may fall differentially on students, depending on their background: "Some students come with limited experience with law and do not have professional parents. Their first language may not be English .... And returning students, older students, bring insecurity about mastering vocabulary and language, at least early on." All students face the complex challenge of translation in another respect. Another professor, leading a research and writing program after many years in practice, stressed the importance of students being "meticulous and clear both for themselves and for their readers" who bring yet another context to bear.

Students themselves framed the challenge in similar terms. Said one, "thinking like a lawyer means learning precision in the use of languages." Said another: "Learning to 'think like a lawyer' means learning language like a dialect of English. [Teachers say they are] trying to get away from hide the ball but it's necessary. It's like Chinese. You need to recognize it and flow with it."

iii. Interpretation and Expression

Interpretation of texts is challenging, even after the threshold of new vocabulary is crossed. Said one professor of commercial law: "[They] need to work with words like parsing modern poetry." They also need "to find ambiguities in statutes," looking for uncertainty rather than certainty in order to find arguments on behalf of their clients. First year students powerfully emphasized the centrality of ambiguity, speaking of their experience in colorful terms in several different focus groups:

Student 1: Thinking like a lawyer means... that there are 80 different interpretations of a sentence. It took a while to get that. Words that should mean the same ... legally mean very different things.

Student 2: Now I watch a TV show... I question the meaning of the English language ... it's kind of scary. "Promise" means a thousand things.

Student 3: I take what I learn in law school and use it in everyday

experience. A friend says he was bumped into at the grocery and I think "is this a tort"? I take theories and meanings of words, and see how they apply to life outside, and incorporate them in how I speak to people. I begin to explain words as a bridge to the outside.

Student 4: "Jargon" terms are used to describe vague terms.

Another senior faculty member explained that students tend "to think words, not concepts," and fail to appreciate the importance of grappling with the underlying ideas even when they have mastered how to use a term. Such an appreciation is particularly important in working with cases as precedents, in order to negotiate the transformation of a phrase and its meaning from one context into the next. An experience familiar to both faculty and students concerns the application of the "reasonable person" standard in torts. A gifted torts professor explained the complexity of helping students begin to work with the relationship between a series of cases as texts:

> The first year class is an example. They learn how to read and brief a case. But they don't have a clear perspective of how a prior precedent might be used in a future case. An example would be the case that talked about the motor scooter driver, whether or not he would be treated as an adult. There were three rationales in the case. Then in the next case, I tried to show how the court was trying to decide whether to treat the defendant as a child or an adult. The students couldn't answer the question related to this issue without trying to understand how the first case might have been resolved depending on which rationale was used. This is how I would sharpen the students' ability to distinguish what a case actually stands for.

The relationship between cases as texts can prove exceptionally difficult for a host of reasons, including the clarity of their exposition, the complexity of their reasoning, and the evolving jurisprudence of a court or courts. Recent work by talented scholars such as Elizabeth Mertz has illuminated the additional linguistic dimension of the task, something that may not be fully understood even by law faculty.[65] According to Mertz, first year students must confront the problem of interpreting text, while recognizing that text in case law is repeatedly "re-contextualized" through interpretation by later cases. They must also engage in dialogue with faculty members who question them about specific aspects of case law, while guiding them purposefully toward particular facets of the text, in effect "indexing" the content by either affirming or ignoring student answers to professorial questions. It is thus perhaps unsurprising that students may find the process of interpretation within the case law genre particularly difficult. Both faculty members and students have long

---

65. *See id.*

observed that interpretation of statutes can be even more challenging, in light of deeply engrained habits of working primarily with cases and on a much more limited basis with statutes during the first year in American law schools.

Both faculty and students use references to language as a means of conveying something larger than the aggregation of capabilities described here. In the following comments, two faculty members and two students use metaphors concerning language and "fluency" in describing "thinking like a lawyer":

> Faculty Member 1: "Thinking like a lawyer" is fluency within the genre.

> Faculty Member 2: On the first day of the first class I ever taught I was terrified. But then I thought about and knew the difference between myself and the class. I could read a case fluently, like it was French, and they could not. My charge was to raise their level of fluency up, through repetition, to force them to express themselves. That's why language and dialogue is very important.

> Student 1: Spanish is my native language. Law is like a language, although I have a hard time communicating legal language and ideas in Spanish.

> Student 2: I'm learning formal logic. I want it to be metaphysical like language. The culture doesn't elevate it, but law school does because someone's freedom and life is at stake.

In an important sense, these metaphorical descriptions capture the sense of the certainty and power that comes with the mastery of language, and the uplifting experience that its skillful use can yield. Here, the metaphor carries a sense of inclusion in a previously foreign professional community, a movement from novice to expert, and a capacity to survive and perhaps help others to do so in a new and sometimes threatening world.

Like the other facets of "thinking like a lawyer," legal literacy addresses several types of uncertainty, repeatedly pushing students to adopt fixed conventions or engage inherent uncertainty by approaching it in particular ways. Students must read, but do so differently than in the past. Language is not a passive formulation on the page, but instead is grounded by its impact in the world. Words hide silences and assumptions, which need to be uncovered, although silences and assumptions may fill the pages of case law and statute books. Ambiguity must be looked for and worked with, but must also be avoided in favor of precision. Words must be distinguished from concepts, and often serve as a complex intellectual code to be deciphered and probed. The same words may have different meanings, depending on context, the writer, reader, or speaker. Text and context is not perennially settled, but is reshaped and reinterpreted in retrospect as new case law develops on the

foundation of the old. Deeper than the surface complexity of words and texts, language serves as a powerful symbol for exclusion, novice status, or lack of power, as well as their opposites–inclusion, expertise, and strength.

e. Learning About Lawyers

Students wonder, very early, what carefully structured questions and reasoning, the legal universe and its language signify for their future lives as lawyers. As they confront the directive to "think" and function intellectually "like lawyers" they must confront at least two associated types of uncertainty: what it means to assume the role of "lawyer," as distinguished from their ordinary self-concept, and what responsibilities and values are associated with that role. The notion of "thinking like a lawyer" strikingly skirts these questions, in contrast to its treatment of other uncertainties that it meets head on. Instead, uncertainties are blunted as a result of persistently superficial treatment of the exceedingly complex issues of role assumption and professional norms. By taking professional roles and values as givens rather than probing the depths of associated quandaries, faculty members avoid the troubling uncertainties they often feel because of their own inexperience with the practicing profession and their discomfort in negotiating different value claims. As a result, students' underlying uncertainties are held in abeyance, postponing the inevitable confrontations between personal commitments and professional responsibilities in problematic and unhealthy ways.

i. Assuming a Role

A number of faculty members, particularly those who have had practice experience, defined "thinking like a lawyer" with reference to teaching students to begin to think "in role."[66] For some, the point was simply that students needed to appreciate that they could not function in a wholly detached fashion, but had to attend to clients. Said one: "How does this class help [students to] think like a lawyer? It looks at tools in the context of social policy. [It starts students] looking at themselves as lawyers with clients." Said another: "I give [students] problems and ask them to think through them .... I ask 'can you imagine an alternative in dialogue with the client?' 'Can you reformulate [the problem] and give it back to the client?'"

Yet another observed:

> Thinking like a lawyer" is contextual. People interact with lawyers because they have problems. We need to refine what "thinking like

---

66. Mertz also discusses the ways in which students develop their legal personae as a result of classroom interaction. *See id.* at 97-137.

a lawyer" means. The current generation is relativist[ic] and that won't cut it as a lawyer. They need to identify real interests, ways of resolving the problem. Many lawyers see themselves as magicians solving problems. I see the client as the center. Doctrinal knowledge is important, but it must be related to a client. Versatility is important.

Other faculty members emphasized that students must learn to differentiate between several different professional roles. Some said that different types of "thinking" are associated with different areas of professional practice, such as securities regulation or work with "high tech" clients. One professor gave a different kind of example from a contracts class:

> I asked the students to take the role of a lawyer advising a client whether to fight the case or offer a settlement. I then spent the next class explaining that when you represent a client, you try to find the weak spots in the other person's case and make an assessment of what the chances of winning or losing are and you give advice on that basis. It is a role that lawyers commonly have. However, two-thirds of the class was acting like they were judges rather than lawyers, and so I told them that there aren't enough courtrooms in [our state] for that.

Some law professors linked their attention to "roles" to the use of "role play," a teaching strategy that they believed would help students think: "The [casebook] I use has different roles for lawyers at different times . . . . I use exercises to try to get students to play roles, looking at fact patterns, making arguments on behalf of the client, [considering] different hypotheticals and how to advise the client." Such ventures are not necessarily simple, however. Another professor colorfully characterized the challenges of truly conveying the realities of "thinking" in a practice setting:

> How do lawyers think? My husband is a practitioner. If he said to a young associate "there's a fire in the drawer" they wouldn't think "what to do?" but would give him six things pro and con. They need to know about issues, [ask] "what don't I know?" be worried about different options and pros and cons, how to choose a strategy . . . how to think creatively . . . [be alert to] all the traps . . . also, [they will be] dealing with clients who aren't lawyers [and who have their] own perceptions and fears.

Such attention to "role" as part of the construct underlying "thinking like a lawyer" seems important for all the reasons noted in the faculty comments above.

Student observations suggest, however, that there is an additional threshold concern about "role" that instruction in "thinking like a lawyer" may have failed to confront. A number of first year students seemed concerned about the even more fundamental transition between being someone who merely lived a

life, and someone who more self-consciously lived a life and also assumed a differentiated role. Said one: "[Thinking like a lawyer means] teaching us to think objectively so we move away from being an individual to [taking an] 'attorney role.' I find that troubling. [I wonder whether my] passions are being killed." Another student said: "You realize your thinking has changed, your values and the depth of your understanding. It leaves you with less creativity. [Thinking like a lawyer] reduces my role and focuses my attention on being an advocate for someone else." Another explained why she found this transition so troubling: "When I go home, I talk about my criminal law interest, and they ask 'how can you defend someone who's guilty?' My answers back home change my feelings about my role. I'm less interested in my own feelings, expressing myself."

Such expressions of uncertainty may pass by the time that students progress further in their legal studies, as they absorb a sense of role identity derived from repeated exposure to cases and the world of law. On the other hand, impending graduation may raise the stakes about one's willingness to embrace the role that seems implicit in "thinking like a lawyer." One student's depiction of this dilemma was particularly poignant:

> I have no idea what [thinking like a lawyer] means or should mean. As far as I'm concerned, I don't want to think like a lawyer. I don't want to sacrifice my common sense. What I mean by that is that a lot of times students or attorneys become so convoluted they lose sight of common sense and the obvious. I'd rather learn the skills and use the skills, but continue to think like myself. I don't want to be one of those annoying people who are so analytical. I do notice that I take time to read things now and that I tend to make comments to my parents that are probably annoying . . . I guess it is inevitable. I read a book that someone sent me about thinking like a lawyer (they sent it to us after we were accepted). I didn't really understand what it meant then. I think about it like a hat [that I have to wear] . . . learning how to play the game, what the professors are requiring or what the bar exam is requiring, so that's what I do. But in day-to-day life, I'd like to not think this way.

"Thinking like a lawyer" not only introduces neophyte students to "role taking," but also conveys an important impression regarding the personal characteristics associated with such roles. As one professor put it: "Thinking like a lawyer is a social practice. First year is a socialization process." In defining "thinking like a lawyer," several faculty members listed particular habits to be encouraged and described the legal mindset. For some, key images relate to "thinking on their feet" or evidencing "hard-mindedness." For others, the emphasis is on care and precision. "[I tell students that 'thinking like a lawyer' means] read closely, listen carefully, reason tightly,

speak precisely." Said another professor:

> [I want to] force them to be detail-oriented, technically [proficient].
> They can't make mistakes. They need to get rid of the picture of *LA
> Law*. They need to dig and keep digging. [They need to] learn the
> language [and learn] discipline. We're exposing them to a lot of new
> things [and a] huge variety of ways to see new things. They need
> intellectual flexibility. "Thinking like a lawyer" means skills that
> can deal with any situation that comes up.

Another observed:

> Thinking like a lawyer . . . to me, that just means that you are
> careful and analytical and you hear what other people say and you
> hear what you say and you know how to probe to find out if they
> mean what they say. I remind them that people are uncomfortable
> when they are questioned or probed. I think all of us at one time or
> another make comments about that. They are learning a skill and
> there is a responsibility of knowing when to use it and when not to
> and what the consequences are. I remember that half of the
> marriages in our class failed. I could see it happening.

Students seemed to have grasped many of these lessons,
describing "thinking like a lawyer" in terms of "objectivity,"
"detachment," "thinking on your own," "seeing every little thing,"
"being prepared," and "imagining all possibilities." Not all habits or
"mindsets" associated by students with "thinking like a lawyer" are
necessarily positive, however. Students also associated the phrase
with "acting on the spur of the moment," being "less patient," seeing
life as "one big problem," "accepting that there are not clear
answers . . . but 'weaseling' to see ways around it," and being
"arrogant" in talking to your mother. The blurring of personal and
professional proved troubling to many students who commented on
"not being able to separate" legal thinking "from the personal," "being
changed" so that one "no longer us[es] adjectives and metaphors" and
stops telling jokes, "losing your beliefs," having your "idealism
crushed," "being robotic," "losing your creativity," and being "unable
to turn [thinking like a lawyer] on and off." These characteristics are
assumed bit by bit, often subliminally it appears. Student awareness
of the import of new roles and responsibilities appears more
pronounced when more overt questions of values are concerned.

ii.   Adapting to Norms

"Thinking like a lawyer" demands that students engage in close
reasoning and explication of cases, opening the way for conversation
about values associated with judicial decisions, the legal system,
lawyers' obligations and individuals' personal views. Unfortunately,
faculty members often seem to gloss over this complex set of concerns
without acknowledging their significance and power and leave the
impression that students' values should be checked at the door.

A number of professors described the process of "thinking" as involving evaluative judgments, without specifying the values or other benchmarks against which such evaluation might take place. Said one, students "have to separate the relevant from the irrelevant, but within the context of what's right." Said another, students need to look at legal tools "in the context of social policy," and see both sides "if there are *good* arguments on both sides." They must "think normatively," "make better and worse arguments," and appreciate "what the law ought to be."

Some professors emphasized that the evaluative function implicit in "thinking like a lawyer" should remain focused on certain kinds of substantive questions, articulated in ways that bleed away underlying emotion. One professor described the kind of inquiry that appeared typical:

> I push [students] to think about it and express their views in class as well as critique what is said in class. For example, I spent almost half of the class [discussing that] when doing summary judgment. I got them to talk about whether or not it made sense to move from the very plaintiff-oriented standard [in one case] to the much more defense-oriented standard in [another]. I spent a whole session trying to get them to think about whether or not the Supreme Court's decision is appropriate and what the impact of that decision is on the litigants, on the jurors, and on the court system.

Another, a professor of constitutional law, explained how she approached teaching important value-laden cases in that field:

> They would read a case such as the abortion case and students would begin to become very upset. One set of students will be outraged that unborn children are being destroyed. And another set of students will be outraged that grown women could be equated with fertilized eggs and that women's freedom should even be challenged. I think that it is helpful if these arguments arise. What I try to convey is that they need to put their arguments into a form with which they could address a court and they need to meet the counter-argument. Eventually they become disciplined and see the need to argue rationally.

Strikingly, few faculty spoke of "justice" and the need to discuss it. Said one:

> It's our responsibility to introduce students to the theoretical basis of law, not to something like "justice." Personally, I consider this an indictment of legal education. But there are so many demands in terms of what should be taught. First year should be changed to include an introduction to principle, skills, and practice. Will it happen here? No.

Another commented:

> I don't see a dichotomy or disconnect with justice . . . . [For

example,] one of hardest things I teach is sexual assault. I can talk about approaches, [and] whether there's a question of how to stack the deck, to move toward acquittals or convictions. I get students to see where the issue is joined, but I can't tell them there's an answer. That involves fundamental value judgments. Law is useful to help students think through clearly where value judgments lie.

There are undoubtedly a variety of reasons for this reticence to engage with value judgments and norms that are embedded deeply in the fabric of the law. One consideration may be the perceived importance of subsuming the process of critical evaluation within the confines of professional roles. Said one thoughtful professor of professional responsibility: "Students must take both sides, and articulate the best arguments. [They must also] stretch arguments to the edge, that's the nature of being an advocate." He continued "[they must] see the strength and weakness of cases versus morality, yet, in practice, litigation pushes them away from this objectivity toward adopting a role as the client's agent." Faculty may be deeply divided ideologically between those who believe external critiques of the legal system are important, and those who believe that such critiques are unfounded or unwise for fear that surfacing ideological issues in the classroom might undercut academic neutrality. A more compelling consideration may relate to the educational purposes of constraining critical discourse: "Some students give just political analyses. They get a lower grade. They need to do legal analysis." In effect, "thinking like a lawyer" itself renders certain kinds of questions off-limits, reflecting a hierarchy of unstated educational objectives that places a high priority on mastering new and less intuitive approaches to critical thinking while putting to the side unstated points of view.

A number of students, on the other hand, forcefully observed that, in their opinion, "thinking like a lawyer" is not "neutral," but incorporates unexamined norms and value judgments, while artificially putting other viewpoints and values out of bounds. Said one, "Here, there's a subtext of moral judgment. [You're] taught that personal opinions don't count. But they do in practice. It may be effective for being a decent lawyer, but not a great lawyer." Others criticized legal thinking as "reductionist," or claimed that such thinking "perpetuates the status quo, what is realistic," while failing to "talk normatively" or discuss "what should the law be as well as what it is." One particularly articulate student observed:

> Legal reasoning is a bit of a fiction. It's unique in that only certain justifications are acceptable. You have to sort through justifications to get to those. You first decide, then look for legal justifications when looking at a judgment. Only certain forms are acceptable justifications. The value system is embedded, but treated as neutral.

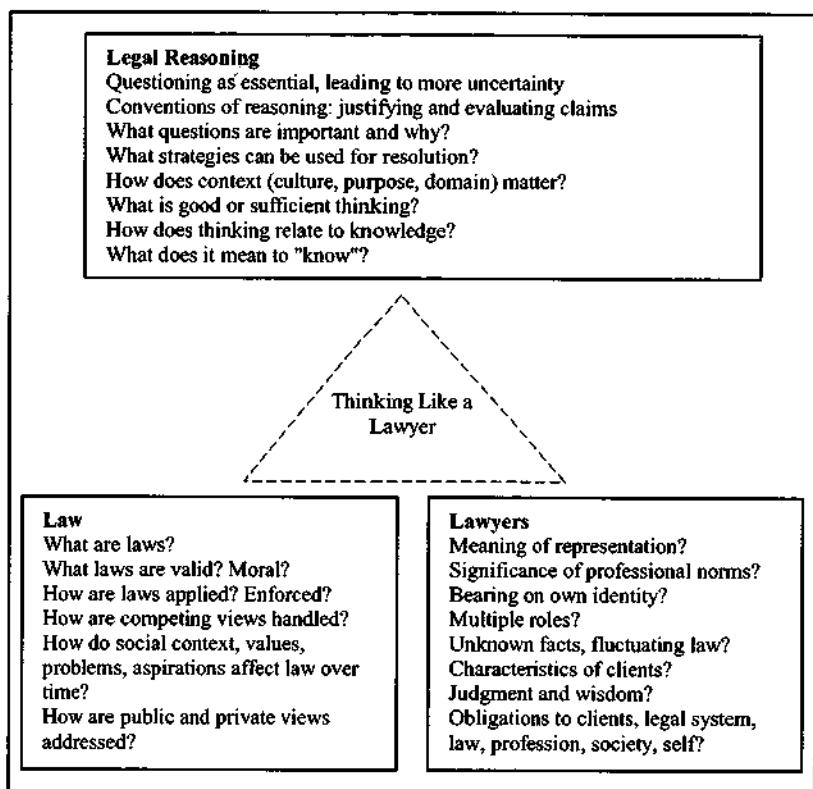Such comments are not necessarily representative of the

opinions of students generally, and may reflect particular political viewpoints or frustration with the discipline that "thinking like a lawyer" entails. At the same time, however, these observations provide useful data concerning the role of "thinking like a lawyer" as a process that deliberately excises certain types of discussion in order to focus students on a narrower arena in which they are expected to become grounded and adapt to new roles and values that differ from those characteristic of the "ordinary" political and intellectual world.

Both faculty and students thus link "thinking like a lawyer" with the assumption of a new role-based identity and an associated set of professional habits and norms. Superficial exposure to the work of lawyers and judges who populate first year casebooks causes students to absorb professional expectations and norms while putting aside more deep-seated personal uncertainty about future professional roles for the time being. At the same time, "thinking like a lawyer" seems to narrow the forms of evaluative judgment that can acceptably be brought to bear, reducing the zone of associated uncertainty, but also raising concerns that marginalizing legitimate forms of social criticism may in due course cause personal values gradually to fade from view.

3. Thinking Like a Lawyer: Grappling with Uncertainty at the Core

As just discussed, "thinking like a lawyer" involves much more than the characteristics outlined in the "literal" depiction of this notion that appeared above. First year students and their teachers who seek to explicate "thinking like a lawyer" in a given particular field are likely to face challenging questions that are embedded within the core of "legal reasoning," the "law," and the role of "lawyers":

Figure 3: "Thinking Like a Lawyer": Key Dimensions

Legal Reasoning
Questioning as essential, leading to more uncertainty
Conventions of reasoning: justifying and evaluating claims
What questions are important and why?
What strategies can be used for resolution?
How does context (culture, purpose, domain) matter?
What is good or sufficient thinking?
How does thinking relate to knowledge?
What does it mean to "know"?

Thinking Like a
Lawyer

Law
What are laws?
What laws are valid? Moral?
How are laws applied? Enforced?
How are competing views handled?
How do social context, values,
problems, aspirations affect law over
time?
How are public and private views
addressed?

Lawyers
Meaning of representation?
Significance of professional norms?
Bearing on own identity?
Multiple roles?
Unknown facts, fluctuating law?
Characteristics of clients?
Judgment and wisdom?
Obligations to clients, legal system,
law, profession, society, self?

Teaching beginning law students to "think like lawyers" forces them to confront such questions and thus endeavors to prepare them to deal with the uncertainty that lies at the core of every dimension of their professional life.

Legal Reasoning. Thinking and reasoning are closely related, and must reckon with uncertainties in rather paradoxical ways. John Dewey offered powerful insights regarding the uncertainties associated with sophisticated *thinking* in law or other fields:

> The concrete pathologies of belief, its failures and perversions, whether of defect or excess, spring from failure to observe and adhere to the principle that knowledge is the complete resolution of the inherently indeterminate or doubtful. The commonest fallacy is to suppose that since the state of doubt is accompanied by a feeling of uncertainty, knowledge arises when this feeling gives way to one of assurance .... Thought hastens toward the settled and is only too likely to force the pace. The natural man dislikes the dis-ease which accompanies the doubtful and is ready to take almost any means to end it. Uncertainty is got rid of by fair means or foul ....

. . . .

> Here is where ordinary thinking and thinking that is scrupulous diverge from each other. The natural man is impatient with doubt and suspense: he impatiently hurries to be shut of it. A disciplined mind takes delight in the problematic, and cherishes it until a way out is found that approves itself upon examination. The questionable becomes an active questioning, a search; desire for the emotion of certitude gives place for the objects by which the obscure and unsettled may be developed into the stable and clear .... No one gets far intellectually who does not 'love to think' and no one loves to think who does not have an interest in problems such as these .... Attainment of the relatively secure and settled takes place, however, only with respect to *specified* [sic] problematic situations; quest for certainty that is universal, applying to everything, is a compensatory perversion. One question is disposed of; another offers itself and thought is kept alive.[67]

For Dewey, then, uncertainty itself fuels thinking, and careful thinking uncovers more uncertainties and associated questions, drawing the thinker onward to consider more deeply layered questions and newly evident problems as the process moves along. The association of thinking with questions and problems yields yet additional uncertainties to be explored.

"Reasoning" suggests a particular form of thinking, one that involves systematic inquiry perhaps of a particular sort, involving certain conventions of logic and methods for justifying claims or evaluating conclusions. Yet even within such a systematic set of practices, key questions remain in doubt. Are some questions more important than others, or more susceptible to resolution through particular philosophical or cognitive tacks? How might context (for example, culture, purpose, knowledge domain) affect the questions that are most pertinent or the answers that might be derived? How might a thinker know when he or she has thought deeply or well enough? How are "thinking" and "knowing" related, and what does it mean to "know"?

The law itself is fraught with uncertainty. Philosophers of law raise a multitude of questions: What are laws? What are the criteria for their existence and validity? Must laws satisfy certain moral requirements in order to be binding? What connection, if any, is there between the existence of laws and the various (judicial and legal) agencies and activities? At a more practical level, uncertainties are inherent in any legal system that endeavors to negotiate between competing needs to articulate reasonably clear legal principles and at the same time tailor their just application to unforeseen disputes. Contending parties inevitably have differing perspectives, as may the
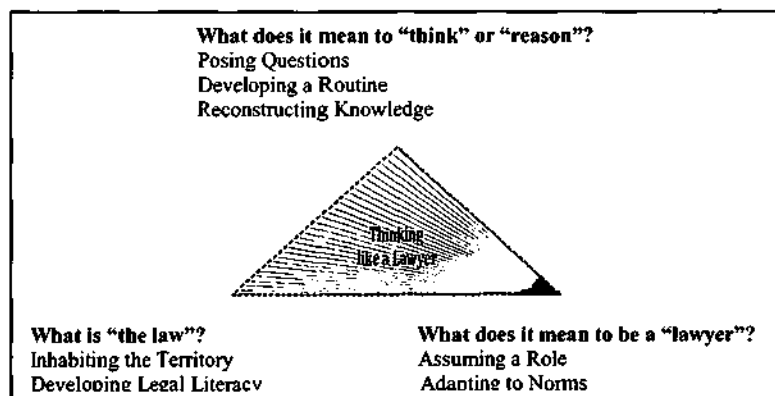
---

67. JOHN DEWEY, THE QUEST FOR CERTAINTY: A STUDY OF THE RELATION OF KNOWLEDGE AND ACTION 227-28 (1929).

decision-making tribunal or judge. The laws reflect the problems, aspirations, social contexts, and values of societies from which they derive, with embedded tensions and imperatives that rise and fall over the span of time. Private parties in sectors as diverse as families and business, and governmental actors performing executive, legislative, and judicial functions at local, state, national and international levels bring to bear inherently differing viewpoints about what has been or should be the law.

Lawyers' roles are by their nature laden with uncertainties of many sorts. At the threshold, lawyers must confront the notion of "representation," and the recognition that they stand in the stead of others, no longer speaking merely for themselves. In doing so they must also recognize that they are part of a profession characterized by certain traits, expectations and associated values that may not resonate with their own sense of identity, at least at first. Lawyers are charged with playing many roles within the legal system, serving as attorneys, counselors, and officers of the court. In representing individual clients, they must confront the challenges of facts that are often unknown or subject to interpretation, law that is in flux or susceptible to conflicting views, and human foibles and desires that may rarely come to rest. Faced with these complex variables, lawyers must nonetheless offer their best judgment about the wisest course of action taking all things into account. They must also find a place to stand that takes into account their obligations not only to their clients but also to the legal system, the law, the profession, society at large, and themselves.

An introduction to "thinking like a lawyer" forces first year students to confront these dimensions of uncertainty in powerful ways, as the following diagram illustrates:

Figure 4: Thinking Like a Lawyer: Strategies for Dealing with Uncertainty in the First Year

What does it mean to "think" or "reason"?
Posing Questions
Developing a Routine
Reconstructing Knowledge

Thinking like a Lawyer

What is "the law"?
Inhabiting the Territory
Developing Legal Literacy

What does it mean to be a "lawyer"?
Assuming a Role
Adapting to Norms

This more nuanced portrayal suggests that there is more to "thinking like a lawyer" than the literal dimensions outlined at the start of this section. In effect, "thinking like a lawyer" is not a name or trope that sufficiently encompasses the challenges that the "wicked problem" posed by legal education in the first year entails. Moreover, to the extent that "thinking like a lawyer" reveals the challenges of confronting uncertainty in the first year of law school, it fails to capture the full array of challenges that those entering the legal profession must confront and that those who educate beginning lawyers must embrace. In a sense, then, legal educators who seek to address Rumpelstiltskin's challenge by claiming that teaching students to "think like lawyers" sufficiently "names" the obligations of legal education are mistaken. They need to search more widely to name their obligations and to prepare law students for the challenges of professional roles yet to come.

4. The "Socratic Method" and the "Case-Dialogue Method": Unlocking the Power of Teaching in the First Year and Beyond

The previous section explored the deeper meaning of the prototypical first year law school learning task described as "thinking like a lawyer." This section briefly considers the pedagogical strategies generally referred to as the "case method" and the "Socratic method." It suggests that the traditional "names" associated with these strategies may blind many legal educators to the virtues and limitations of first year pedagogical practices. More conscious use and supplementation of the "case-dialogue method" can help students to master "thinking like a lawyer" more effectively, illuminate important aspects of law school assessment practices, and open space for innovation beyond the first year.

a. The Prototypical "Case Method" and "Socratic Method"

Law school graduates and entering students know well the prototypical pedagogy, the classic approach to teaching, which characterizes (and often caricatures) legal education.[68] Two phrases

---

68. John Jay Osborne's novel *The Paper Chase* provides a dramatic example of the caricature that often springs to mind. Professor Kingsfield calls on the protagonist,

> Mr. Hart, who is unprepared:
> "Mr. Hart, will you stand?" [Hart stood].
> "Now, Mr. Hart, will you give us the case [of Hawkins v. McGee]?"...
> [Hart said he was not prepared]. Kingsfield walked to the edge of the

are most generally used to describe it: "the case method" and "the Socratic method The nature, contributions and criticisms of each of these pedagogical phenomena are worth noting in turn.

Since the turn of the twentieth century, American legal education has generally adopted the "case method" of instruction pioneered at Harvard Law School beginning in 1870.[69] This case method has at least two major characteristics. It relies on edited appellate court cases, collected in "casebooks" that every student is expected to read. Cases serve as touchstones for instruction, that is, points of departure for pursuing a number of distinctive instructional goals including imparting knowledge about the legal process and selected legal principles, and developing students' independent capacity to engage in legal reasoning and associated tasks.

---

platform.

"Mr. Hart, I will myself give you the facts of the case. Hawkins versus McGee is a case in contract law, the subject of our study. A boy burned his hand by touching an electric wire. A doctor who wanted to experiment in skin grafting asked to operate on the hand, guaranteeing that he would restore the hand 'one hundred percent.' Unfortunately, the operation failed to produce a healthy hand. Instead, it produced a hairy hand. A hand not only burned, but covered with dense matted hair.

"Now, Mr. Hart, what sort of damages do you think the doctor should pay?"

... Hart said nothing.

"As you remember, Mr. Hart, this is a case involving a doctor who promised to restore an injured hand."

... "There was a promise to fix the hand back the way it was before," Hart said.

Kingsfield interrupted: "And what in fact was the result of the operation?"

"The hand was much worse than when it was just burned . . ."

"So the man got less than he was promised, even less than he had when the operation started?"

Kingsfield wasn't looking at Hart now. He had his hands folded across his chest. He faced out, catching as many of the class's glances as he could.

"Now, Mr. Hart," Kingsfield said, "How should the court measure the damages?"

"The difference between what he was promised, a new hand, and what he got, a worse hand?" Hart asked.

Kingsfield stared off to the right, picked a name from the seating chart.

"Mr. Pruit, perhaps you can tell the class if we should give the boy the difference between what he was promised and what he got, as Mr. Hart suggests, or the difference between what he got, and what he had."

See OSBORNE, *supra* note 48, at 6-9.

69. For a scholarly exploration of the case method from its inception, see Bruce Kimball, *"Warn Students That I Entertain Heretical Opinions, That They Are Not to Take as the Law": The Inception of Case Method Teaching in the Classrooms of the Early C. C. Langdell, 1870-1883*, 17 LAW AND HISTORY R. 57 (1999). *See also* Bruce Kimball, *The Proliferation of Case Method Teaching in American Law Schools: Mr. Langdell's Emblematic "Abomination," 1890-1915*, 46 HIST. OF EDUC. Q. 192 (2006).

The "Socratic method" is sometimes used synonymously with the "case method," but has specific connotations of its own. "Socratic questioning" has long been associated with the famous Greek teacher, as Plato portrayed him, engaging students in rigorous inquiries about virtue and truth.[70] More recently, "Socratic teaching" has taken on nearly mythological dimensions, thanks to its association with intimidating and at times demeaning forms of interaction such as practiced by Professor Kingsfield or Professor Perini of *One L* fame. In reality, most knowledgeable participants and observers acknowledge that present-day classroom interaction rarely resembles the interrogation for which Socrates, Kingsfield, or Perini are known.

The dialogue now associated with legal education instead involves faculty-student interchange of the following sort. It may entail varied forms of interaction—not only extended colloquy between a teacher and a single student, but also a sequence of shorter exchanges between faculty members and multiple students, and exchanges among students themselves. It is fueled by questions implicit in the subject matter (the dialectical quality of legal disputes and the dynamic character of analogical reasoning across jurisdictions and time) and driven by the instructional goal of developing students' capacity for independent professional thought. It is situated in a complex classroom context in which multiple instructional objectives must be juggled and the needs of many learners must be met.

Early studies by Josef Redlich and Alfred Reed for The Carnegie Foundation for the Advancement of Teaching provided an important evaluation of the "case-dialogue method" shortly after it had gained nearly universal acceptance as the defining pedagogy in American legal education.[71] Redlich, in particular, found a good deal to admire

---

70. *See* Plato, *Meno*, *in* PLATO: THE COLLECTED DIALOGUES 353 (Edith Hamilton & Huntington Cairns eds., W.K.C. Guthrie trans., 1987); Peter M. Cicchino, *Love and the Socratic Method*, 50 AM. U. L. REV. 533 (2001) (discussing classical Greek understandings); Peggy Cooper Davis & Elizabeth Ehrenfest Steinglass, *A Dialogue about Socratic Teaching*, 23 N.Y.U. REV. L. & SOC. CHANGE 249 (1997) (discussing method by using format reminiscent of true Socratic teaching).

71. *See* JOSEF REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, BULLETIN NUMBER EIGHT (1914); ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNIVERSITY LAW SCHOOLS OF THE UNITED STATES WITH SOME ACCOUNT OF CONDITIONS IN ENGLAND AND CANADA, BULLETIN NUMBER FIFTEEN (1921); PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA, BULLETIN NUMBER TWENTY-ONE (1928). For a thoughtful discussion comparing these studies and the more recent *Carnegie Report*, see James R. Maxeiner, *Educating Lawyers Now and Then: Two Carnegie Critiques of the Common Law and the Case Method*, 35 INT'L J. OF LEGAL INFO. 1 (2007).

in the educational benefits associated with the method, particularly insofar as it provided a means for students to learn through experience. He cited the engagement of students as a result of work with primary narratives and application of law to facts, as well as the complementary effects of intensive individual preparation and collaborative inquiry with teachers in the classroom and classmates in informal moot court activities. Redlich also emphasized the importance of the new conceptualization of legal education as a means not only of transmitting knowledge but also of developing thinking skills and a capacity for continuing self-teaching. He acknowledged some shortcomings, including the possibility that beginning students would be confused and the risk that intensive attention to separate cases would leave students without a broader understanding of law as a whole, but found these to be remediable.

Other forceful considerations also commended the case method in Redlich's opinion. There were benefits to the profession in developing students' practical intelligence, and preparing them to perform more effectively than had been possible under the prior regime of lecture/textbook instruction and apprenticeships in law offices. The new method fit well with the American legal system, given its emphasis on common law reasoning and judicial decision-making. Redlich was perhaps even more enamored by the case method's implications for educational institutions and the broader social culture, citing the importance of a "scientific" method of studying law that involved independent thinking about primary sources, the potential for more sophisticated research by full-time law teachers, and the fit between this educational method and Americans' individualistic character traits.[72]

Reed was a bit more sanguine in his assessment. He was careful to emphasize certain conditions associated with the "case-dialogue method" that he believed needed to exist for it to be a meaningful and effective pedagogy. These conditions included the importance of students' intellectual and personal maturity in light of the "intellectual labor" required, the need for study time, effective teachers, and comprehensive application (rather than "small doses" of use).[73] He acknowledged the potential risks of exaggerating devotion to the common law (compared to legislative and "popular" law) and the limitation of preparing lawyers insufficiently for practice, but concluded that this approach did a better job than the alternatives then in view (textbooks, lectures and apprenticeships).

More recent observers have offered similar praise and criticisms of case method. For example, Paul Carrington offered a

---

72. REDLICH, *supra* note 71, at 41-42.
73. REED, *supra* note 71, at 381-82.

comprehensive review of the benefits and problems.[74] Carrington's litany of benefits is a comprehensive one, including the potential of the case method to instill mental discipline and insight about how to "learn the law," the engaging power of narrative, the enhancement of professional judgment, the understanding of common law and its development, and the development of moral character.[75] It is not clear whether these benefits are directly attributable to the "case method" or to the use of the "Socratic method" of questioning in conjunction with the study of cases, as discussed below. To this listing, other benefits might be added: the potential for development of "deep knowledge," the chance to participate in the "construction" of knowledge that fosters memory and self-confidence, the opportunity to teach about the legal process and lawyering as well as about how to read cases and engage in critical analysis, the power of learning in an authentic context that resembles at least to some degree the actual practice setting, and the educational force of gaining certainty in the face of pre-existing doubt.

Carrington also concedes that opponents of the case method (or the use of the "Socratic method" in conjunction with the case method) have cited important drawbacks, including potential problems of elitism, lack of legal "realism," potential to foster political conservatism, student discomfort in the classroom, and a tendency to foster cynicism.[76] There may also be additional drawbacks worthy of note.[77] The "case method" uses only certain types of cases and

---

74. *See* Paul Carrington, *Hail! Langdell!*, 20 LAW & SOC. INQUIRY 735-59 (1995).

75. *Id.* at 742-45 (citing the affection of students for rigorous questioning), 745-46 (citing mental discipline and instruction in how to learn the law), 746 (citing "democratizing" dynamic in the classroom and tendency to foster intellectual independence), 747 (citing enhancement of professional judgment instead of "passive learning"), 747 (fostering reflective capacity to attend to one's own blind spots), 748 (citing effectiveness and efficiency in the hands of able teachers), 749-54 (discussing legal theory and development of common law, including the role of judges, differences among jurisdictions, uncertain and changing character), 754-59 (asserting that case method contributes a moral subtext and adds to students' self-knowledge, moral courage, and commitment to the aspirations of law), and 846 (citing the engaging power of narrative). *See also* David Garner, *The Continuing Vitality of the Case Method in Twenty-First Century*, 2000 B.Y.U. EDUC. & L.J. 307 (2000) (discussing merits of case method including teaching students to think like lawyers, teaching them to teach themselves, personalizing legal education, personalizing "realistic" presentation of the law, encouraging reflection of complexity of law, and institutional efficiency; and explaining limitations including objectives and scope, teaching techniques, and institutional effects such as minimizing jurisdictional differences).

76. Carrington, *supra* note 74, at 739-42.

77. For other criticisms of the case method, see, e.g., Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517 (1991) (discussing development of case method; purported justifications including providing a context for learning law, teaching students to read cases, teaching students to engage in critical analysis, developing mental toughness, learning about the system of precedent,

employs them for the narrow purposes of distilling doctrine and practicing formalistic reasoning. It often assumes that there is a single answer to the question "what is this a case of," and tends to shift without clear signals between "paradigm" cases that exemplify good lawyering and judicial decision-making and cases that reflect poor work by lawyers and judicial decisions that may be wrong. The legal "case method" also relies very heavily on dynamically distilling principles and testing their application, a process which is characteristic of analogical and casuistic reasoning in settings where there is a shared understanding of formal knowledge and conventional reasoning. In doing so, it essentially ignores both the "messy" characteristics of the context in which disputes arise and the potential for a different kind of "case method," one that focuses on "problems" to open the way for inquiry about a wider range of questions.

The "Socratic method," even more than the "case method," has been defended and critiqued in recent decades. Defenders cite many of the benefits of the "case method" considered above, including the importance of learning through self-discovery, internalizing dialectic inquiry, and developing students' capacity to deal with indeterminacy and to think on their feet.[78] Critics on the other hand cite the adverse effects on students (who may feel humiliated), the potential alienation of women and students of color, adverse effects on students with incompatible learning styles, and tendency to encourage cynicism.[79]

---

understanding the legal process, and learning about lawyering; citing problems with casebooks, teaching techniques, examinations, and student resistance; and developing strategies for overcoming limitations of method); Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609 (2007) (discussing development of case method, criticizing its linkage to the view that the development of common law reflects "scientific" principles, and urging curriculum reform to reflect the development of the administrative state).

78. *See, e.g.*, Phillip E. Areeda, *The Socratic Method (SM) Lecture at Puget Sound, 1/31/90*, 109 HARV. L. REV. 911 (1996) (arguing that Socratic Method is not the case method, nor is it merely a recitation of assignments, an antiphonal catechism, an opinion survey, a vague failure to follow up, a mid-lecture pause, an effort by proponents of critical legal studies effort to demonstrate indeterminacy; also rejecting criticisms about the Socratic method including student criticism relating to "hiding the ball" and wasting class time, intimidation and humiliation of students, and confusion or boredom of students); *see also* Carrington, *supra* note 74.

79. *See, e.g.*, Michael Vitiello, *Professor Kingsfield: The Most Misunderstood Character in Literature*, 33 HOFSTRA L. REV. 955 (2005) (discussing criticisms that Socratic method discriminates against women, that method is ineffective, that it encourages cynicism, and that it disadvantages students with different learning styles); James R. Beattie, Jr., *Socratic Ignorance: Once More Into the Cave*, 105 W. VA. L. REV. 471 (2003) (discussing benefits of the Socratic method and strategies for limiting adverse effects including potential for humiliation, perceptions that professors "hide the ball," encouragement of combativeness, and silencing of women and

What is missing from these statements of support for or critique of the "case method" and "Socratic method" is an educator's explanation of how these techniques, taken together (rather than in isolation) support students' efforts to learn how to "think like lawyers." The discussion of these methods also tends to consider inherent strengths and weaknesses of the methods, without looking at other crucial questions regarding how these methods relate to law school assessment practices and how their benefits or limitations should be evaluated in light of the contexts in which they are employed. These issues are more fully explored below.

b.   Renaming and Reconceiving: The "Case-Dialogue Method" at its Best

Observations of classroom teaching during the Carnegie Foundation's recent study of legal education reveals some critical dimensions that bear on how traditional legal pedagogy should be understood as it has evolved over the years. In particular, there is need to recognize the interrelation between the "case method" and the "Socratic method" of encouraging faculty-student dialogue. For purposes of better understanding these dynamics, it is important to recognize that there is a close linkage between these methods and the objective of teaching students to "think like lawyers." To underscore the relationship between the raw materials (cases) and teaching techniques (dialogue), a new way of "naming" the traditional pedagogical process is needed. The term "case-dialogue method" more effectively captures the core learning and teaching dynamics that are at the heart of things. First, instruction in traditional case-based forms of legal reasoning involves helping students master a set of key intellectual tasks associated not only with the law but also with higher-order thinking outside of the law (the "intellectual tasks" theme). Second, classroom dialogue involves a complex dance in which teachers bring to bear an array of subtle instructional tactics that render visible tacit understandings and misunderstandings much as a skilled artisan might guide an apprentice in the early stages of mastering a craft (the "instructional tactics" theme).

---

minority students); Lani Guinier et al., *Becoming Gentlemen: Women's Experience at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1995) (discussing perceived adverse effects of use of Socratic method on women and people of color); David Garner, *Socratic Misogyny—Analyzing Feminist Criticisms of Socratic Teaching in Legal Education*, 2000 B.Y.U. L. REV. 1597 (2000) (discussing various studies of adverse effects).

i. Intellectual Tasks and Instructional Tactics: A
Framework for Observing the Dynamics of
Legal Reasoning and Classroom Interaction

Brief descriptions of legal thinking and bare-bones definitions of the "case-dialogue method" only scratch the surface of the powerful dynamics at work in first year law school classrooms as faculty help students learn to "think like lawyers." It is therefore important to develop a functional framework that can help illuminate two critical dimensions of the classroom dynamic – the interplay of key intellectual tasks associated with traditional case-based legal reasoning and the array of instructional tactics employed by teachers in order to build their students' capacity to perform these tasks.

Intellectual Tasks, Legal Reasoning and the Dynamic of Cases

A powerful framework for understanding the core tasks associated with legal reasoning can be forged from the ideas of two noted educators, one a renowned law teacher and scholar with eclectic interests, and the other the architect of a "taxonomy" of educational objectives that cut across a range of disciplines and is used to describe key aspects of higher-order thinking world-wide.

The legal scholar, Karl Llewellyn, distilled insights from years of thinking and teaching and shared them with novice law students through lectures given during the 1929-30 school year and preserved in the well-loved classic, *The Bramble Bush*.[80] Llewellyn offered a masterful description of the operation of a typical law school class, emphasizing the complex and dynamic "levels of discussion" evident there. Benjamin Bloom, a psychologist charged with organizing comprehensive examinations for undergraduates at the University of Chicago, conducted extensive empirical research to determine the fundamental educational objectives shared by faculty members in a variety of fields. Working with colleagues, Bloom developed and carefully defined a set of core cognitive capacities, arranged with an eye to increasing levels of complexity, along with concrete examples of associated intellectual tasks to be used as a guide to student assessment.[81]

Bloom's educational objectives and the cognitive processes they represent correspond in striking detail to the "levels of discussion" enumerated by Llewellyn (who stressed knowing and comprehending what a court had decided; analyzing the rule of the case and the court's interpretation of evidence; applying precedent to other cases

---

80. KARL N. LLEWELLYN, THE BRAMBLE BUSH : THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL (1996) [hereinafter THE BRAMBLE BUSH: THE CLASSIC LECTURES].

81. *See* BLOOM'S TAXONOMY, *supra* note 50.

and fathoming its impact on the real world; relating and synthesizing cases as part of an evaluation of doctrine; and evaluating a court's decision in terms of its desirability in broader terms).

These distinctive cognitive tasks and associated "levels of discussion" are implicitly dynamic, since each step along the chain of thinking involves a cognitive process in and of itself. For example, knowledge and comprehension require work with complex texts and appreciation for surrounding social and historical context. Analysis can be shaped from the vantage of each of several disputing parties, a judicial tribunal, and the academic observer. Legal principles derived from cases can be applied and tested in a range of factual circumstances. Synthesis can have a relatively narrow focus (comparing a series of related cases) or can embrace a broader field (whole areas of legal doctrine or links between the law and related social policy). Evaluation can involve judicial or academic viewpoints, critiques of doctrinal consistency, or consideration of external criteria relating to justice. In addition, the multiplicity of tasks and levels invites dynamic movement from one task and level to the next, as points of certainty and uncertainty are established, competing arguments are crafted, and interrelated case law and doctrine are explored.

Figure 5: The Nature of Legal Reasoning: Intellectual Tasks

Bloom's Taxonomy of Educational Objectives[82]	Llewellyn's Levels of Discussion on Law[83]
Knowledge Knowledge of specifics, ways and means of dealing with specifics, universals and abstractions in a field	"There is first the question of what the court actually decided in a given case . . . . And the question of what express ratio decidendi it announced. These are facts of observation. They are the starting point of all discussion."

---

82. *Id.*

83. KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY (1930) [hereinafter THE BRAMBLE BUSH].

Comprehension
Understanding of meaning; translation, interpretation, and extrapolation

"There is the question of what the rule of the case is, as derived from its comparison with a number of other cases."

Analysis
Identification of constituent elements and their relationships and of organizational principles

"There is the question of the manner, attitude and accuracy of the court's interpretation or transformation of the raw evidence."

Application
Determining relevant principles; using relevant principles

"There is the question of what the probable precedent value of the case is, in a given court or in general . . . it is a question of predicting what some court will in fact do."

Synthesis
The production of a unique communication, plan, or set of abstract relations

"There is the question of estimating what consequences the case (and its effects on other cases) will have to laymen: the relation between the ways of the court and the ways of those affected by the court."

Evaluation
The rendering of judgments based on internal and external evidence

"There is the question of evaluating the court's action in the case—of concluding how desirable it is. And this is of course the most complicated of all, because it includes all the foregoing, and the various premises also as to what values are to be taken as the baseline and the goal . . . . There is the evaluation of the court's decision or ratio from the angle of doctrine. Here some premise or concept is assumed as authoritatively given, and the court's action is tested for whether it is or is not dogmatically correct, when compared with that premise . . . [or] to test its consistency with some formulation of 'rule' derived inductively from other cases."

Instructional Tactics and The Dynamic of Dialogue

The dialogue of professor and students that plays such a central role in legal education's prototypical "case-dialogue" pedagogy contains its own dynamic of question and answer, comment and response. It is also modulated by the professor's selection of various student respondents, students' willingness to volunteer, the patterns of speech and silence, and the sorts of voices that are included or excluded from the room.

This dialogue and its underlying dynamic have subtleties that are rarely explored. It is not the casual dialogue of day-to-day conversation among fellow students or friends. Instead, the dialogue is part of an ongoing conversation between expert and novice, between master artisan and journeyman who seeks to learn. In a sense, the dialogue of the legal "case-dialogue method" is embedded in the context of an apprenticeship system, different from but also similar to the apprenticeship system of law office study that preceded its adoption, and other traditional systems used to educate professionals, craftsmen, midwives, and others, time out of mind.

Modern studies of apprenticeship systems have yielded new theories of "cognitive apprenticeship" with associated insights that shed helpful light upon the classroom dynamics associated with formal instruction in law and other fields. The "cognitive apprenticeship" theory of John Seely Brown, Allan Collins, Paul Duguid and others[84] argues that faculty-student interaction associated with effective learning involves a sort of "apprenticeship" through which intellectual development occurs. Although the process of development parallels that found in traditional craft apprenticeships, it is less obvious because the complex cognitive patterns of teacher-experts are generally not explicit and are thus difficult for their student-novices to observe. Likewise, it proves difficult for teachers to discern errors and misunderstandings that may be occurring in students' minds. These difficulties are especially

---

84. *See* J.S. Brown et al., *Situated Cognition and the Culture of Learning*, 18 EDUC. RESEARCHER 32-41 (1989); A. Collins et al., *Cognitive Apprenticeship: Teaching the Crafts of Reading, Writing, and Mathematics, in* KNOWING, LEARNING, AND INSTRUCTION: ESSAYS IN HONOR OF ROBERT GLASER (L.B. Resnick ed., 1989); *see also* Susanne P. Lajoie, *Developing Professional Expertise with a Cognitive Apprenticeship Model: Examples from Avionics and Medicine, in* DEVELOPMENT OF PROFESSIONAL EXPERTISE: TOWARD MEASUREMENT OF EXPERT PERFORMANCE AND DESIGN OF OPTIMAL LEARNING ENVIRONMENTS 61 (K. Anders Ericsson ed., 2009) [hereinafter Ericcson] (providing sophisticated insights regarding the potential and limits of computer-based teaching designed to provide "cognitive apprenticeship" preparation in avionics and medicine; suggesting that "well-structured" domains are more readily modeled that "ill-structured" domains; and noting that it may be more difficult to model team-based approaches to problem solving rather than individually-based approaches to problem solving).

pronounced in large classroom settings such as those in which the "case-dialogue method" is often employed.

"Cognitive apprenticeship" theorists have created useful rubrics for articulating and observing the subtle dynamics of the teacher-student dialogue in situations such as these. Expert teachers may employ a variety of methods or strategies as they initiate or advance dialogue. Such methods include:

> "Modeling" by making cognition visible;
>
> "Coaching" by providing guidance and feedback;
>
> "Scaffolding" by providing support for students who have not yet reached the point of mastery; and
>
> "Fading" by encouraging students when ready to proceed on their own.

"Cognitive apprenticeship" theory likewise offers helpful rubrics for describing and observing student responses to the teaching methods implicit in classroom dialogue. Important student strategies include:

> "Articulating" by providing explicit descriptions of their understanding so that it is no longer invisible;
>
> "Reflecting" by pausing to consider what they know; and
>
> "Exploring" by testing their understanding in next settings in which it might apply.

An illustration from literature provides a case in point. Thinking back to the classic example of case-method/Socratic dialogue provided by Professor Kingsfield and first year student "Mr. Hart" in John Jay Osborne's *The Paper Chase*.[85] In that context, the techniques of teaching and the corresponding expectations of students can now be named and become quite plain. To focus first on the actions of the teacher, previously invisible pedagogical moves can be readily discerned. When Hart is unable to recite, Kingsfield "models" by providing the facts of the case ("Hawkins versus McGee is a case in contract law . . . A boy burned his hand . . . A doctor wanted to experiment . . . the operation failed to produce a healthy hand . . . it produced a hairy hand."). He then "coaches" Hart ("As you remember, Mr. Hart, this is a case involving a doctor who promised to restore an insured hand"). He also provides "scaffolding" ("And what in fact was the result of the operation?" "So the man got less than he was promised, even less than he had when the operation started?") so that Hart can finally respond. Finally, Kingsfield moves on to another student, "fading" as Hart has given the semblance of an answer he was looking for.
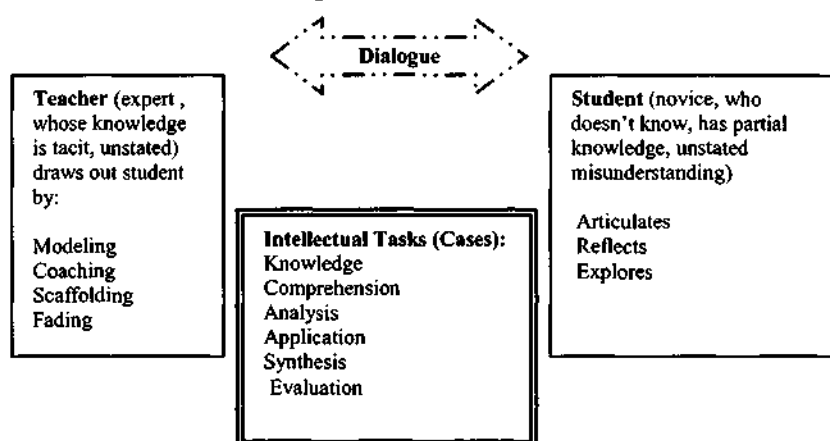
---

85. *See supra* note 68 for text of the class scene in first year contracts.

Similarly, the pattern underlying student responses become more apparent and understandable. Hart and the subsequent student tapped for recitation were given the task of "articulating" their understanding by stating the case and responding to related questions. Hart endeavored to reflect ("Hart reached into his memory for any recollections of doctors ... Hart tried to remember the summation he had just heard, tried to think about it in a logical sequence") to no avail. Turning to another student, Kingsfield demands further "exploration" of key concepts ("Mr. Pruit, perhaps you can tell the class if we should give the boy the difference between what he was promised and what he got, as Mr. Hart suggests, or the difference between what he got and what he had").

A Composite Framework

The distinctive dynamics of case-based legal reasoning and dialogue-based instructional interaction come together in important and energizing ways. As professors determine how best to use key cases, they take into account the context of their material, their particular day's objectives, and the extent of student mastery given the progress of the academic year. At each step in the process of discussion teachers may adopt different stances of interaction with their students (modeling, coaching, scaffolding, fading), calling forth different student responses as appropriate to an individual's or the class's overall understanding and needs. This complex picture of choices and possibilities is depicted in the composite diagram (Figure 6) that follows.

Figure 6: Intellectual Tasks and Instructional Tactics: Composite Framework

Dialogue

Teacher (expert, whose knowledge is tacit, unstated) draws out student by:

Modeling
Coaching
Scaffolding
Fading

Intellectual Tasks (Cases):
Knowledge
Comprehension
Analysis
Application
Synthesis
Evaluation

Student (novice, who doesn't know, has partial knowledge, unstated misunderstanding)

Articulates
Reflects
Explores

This frame of reference and associated terminology should prove helpful in structuring and shaping classroom discussions, if professors understand the intellectual tasks that students learning to "think like lawyers" must master, and the techniques that can be employed to move them toward that goal. Notwithstanding classroom practices, however, assessment practices and contexts in which the "case-dialogue method" can best be employed play a crucial role that has been insufficiently explored.

> 5. "Thinking Like a Lawyer," the "Case-Dialogue Method" and Their Implications: Unanswered Questions

As a result of exposure to the "case-dialogue method," first year law students learn critical lessons about higher-order intellectual skills, based on their exposure to intensive instruction. A host of important questions remain, however, ones that law schools often tend to avoid. This section endeavors to identify some crucial unanswered questions, and poses them for further consideration by faculty members (in the spirit of true "Socratic" inquiry). A deeper understanding of the dynamics of the "case-dialogue method" provides important insights about the role of that pedagogical approach in encouraging student learning. At the same time, additional questions are raised that have rarely been considered by law faculty members.

Partnering with Students in Developing Intellectual Tasks. "Thinking like a lawyer" involves an array of sophisticated intellectual tasks that are generally not named or described explicitly, but which correspond to widely-recognized cognitive tasks associated with higher-order thinking often familiar to those students with strong earlier academic preparation and less well-known to others with more non-traditional backgrounds. Would explicitly naming and addressing these issues make a difference in student performance?

Legal Analysis. Students are taught a structured form of analysis that focuses on individual cases or lines of cases within a doctrinal context and emphasizes certain questions relating to relevant facts, doctrinal holdings, lines of argumentation, judicial reasoning, and the use of cases as precedent. What are the implications of this emphasis with regard to students' understandings of other aspects of the law (such as statutes)?

Application. Students learn to apply abstract principles of legal doctrine through experience working with simple hypothetical fact-patterns, consideration of current events, and occasional role-plays, but there is little apparent effort to stretch their thinking by applying the law to more complex problems over time. Law school examinations typically pose complex scenarios requiring application

of legal principles. If students are not afforded opportunities to develop skills relating to application of legal principles in complex scenarios, what are the implications for the legitimacy of law exams?

Synthesis. Although the abilities to observe complex patterns and construct aggregated "chunks" of knowledge are of considerable importance, students generally receive little formal instruction about or practice in synthesizing complex ideas, other than through the process of comparing individual cases or observing the models provided by their teachers. Students are often expected to engage in complex synthesis of ideas in order to perform well on law school exams. What is the significance of this disjunction?

Evaluation. Students are taught to engage in limited forms of evaluation that consider the logic and consistency of doctrinal developments and their relation to conceptual themes developed within a particular course, but are rarely asked to engage in external critiques of the law emphasizing such considerations as fairness or justice, leaving the impression that these topics are of little concern or importance, and providing little chance for them to develop their abilities to evaluate such matters on their own. What is the significance of this disjunction?

Assessment. Faculty members need to give careful attention to how their assessment techniques (typically using "fact-based scenarios" that assess student expertise)[86] actually correspond with the intellectual tasks that they expect of students in their first year classrooms. Often classes emphasize comprehension, analysis, and simple application, while examinations call upon students to engage in complex application, synthesis, and evaluation. If that is indeed the case, unsophisticated students may be caught unaware in addressing complex scenario-based examination questions, and resulting performance may reflect past experiences more than what is actually taught in law school. What are the implications of this disjunction? What are the implications of this approach to assessment for students with more or less sophisticated undergraduate preparation? If it takes time to "practice" and develop sophisticated levels of expertise in dealing with intellectual techniques, do law school practices in ranking students based on grades beginning in the first semester result in limiting opportunities for students with considerable abilities who may take a bit longer to develop the "analytical thinking" skills required compared to students who enter with such skills already developed?

Notable Gaps: The Profession and Perspectives. Students generally receive little systematic grounding in the roles and responsibilities of lawyers, the interrelation between cases and

---

86. *See infra* text accompanying notes 269-73.

statutes or doctrinal areas, and the broader intellectual and social context in which law operates, unless faculty members compensate for limitations inherent in the traditional "case-dialogue method." The possible result is a devaluation of these issues or creation of misimpressions about their importance among students. Faculty members must compensate for these shortcomings of the "case-dialogue method" if they wish their students to understand critical issues of this sort.

Systematic Development. What would be the effect if law faculty members explored parallels with undergraduate intellectual development more systematically? Could these parallels be more explicitly and systematically exploited by law teachers in order to help students master high-order thinking more readily and effectively? If so, how might that be accomplished?

Progression. Bloom's taxonomy, as embodied in the "case-dialogue method" of teaching, assumes a type of progression from less to more complex educational objectives, with each level building on the one that precedes it and moving toward another requiring greater sophistication of thought. Might law faculty give further consideration to structuring some aspects of instruction with this notion of progression in mind?

Unmet Challenges of Complex Thought. Have law schools limited their expectations of themselves and their students by focusing so heavily on certain educational objectives (comprehension, analysis, and simple application), and giving others (such as more sophisticated forms of application, synthesis, and evaluation) short shrift? Should this pattern be changed, and if so, how?

More Visible Student Thinking. Should law students be taught explicitly about the need to make their thinking processes more visible and should more explicit attention be given to enhancing their capabilities as thinkers through monitoring, diagnosing, and assessing what they know? Might they prove to be more effective learners as a result?

Stages of Intellectual Development. Do students' cognitive abilities develop in stages, as is the case with craft apprentices' skills? If so, how might law teachers cement a sense of mastery step by step, build effectively on prior learning and develop increasing sophistication over time through movement toward more diverse and complex problems? Would more attention to sequencing educational tasks prove useful, and what would it entail?

Professional Culture in the Classroom. Does a sense of professional context and culture shape learning in the classroom, as it does where more traditional forms of apprenticeship are concerned? Could the dynamics of law school classes be reshaped to move beyond the current culture of silence, passivity and

unproductive competition to create a different kind of culture that fosters intrinsic motivation and in turn improves the deteriorating professionalism of the bar? If so, what steps would be required, and how might they be taken while preserving a sense of high expectations and rigorous inquiry consistent with academic norms?

Students' Prior Experiences. How do students' abilities to quickly master sophisticated intellectual tasks in law school relate to prior academic experiences, pre-existing familiarity with structured forms of higher-order thinking, and choices of instructional strategies that may or may not link learning to familiar contexts outside the law?

Students' Hunger for Experience. Students appear very responsive to, and very hungry for, experience with the kinds of problems and experiences they hope to encounter in the profession. Does the intensive attention now paid by even first year students to co-curricular activities (such as special interest organizations or various competitions) reveal that they are abandoning the classroom as the site for meaningful learning of this sort? If so, is that a problem?

Faculty Experience. Faculty members at times attempt to expand the scope of instruction in order to give students a greater appreciation for the roles of lawyers and the sweep of the law. What do the challenges associated with such efforts suggest about other invisible constraints associated with the "case-dialogue method," are such constraints a problem, and how might they be addressed?

Expectations of Mastery. Instruction in the forms of legal reasoning associated with "thinking like a lawyer" is largely unbounded, that is, there is no real sense that a particular discernable level of mastery is to be developed by the end of the first year. Could meaningful benchmarks be set for determining when sufficient time has been spent on this endeavor and students have achieved an acceptable level of basic mastery, so that additional educational goals might be embraced more explicitly beyond the first year?

Lawyers' Roles and Social Context. Are the apparent gaps in instruction about the law and lawyers' roles indeed important? Might students learn to "think like lawyers" more readily if they received clearer guidance about the relation between law study and the intellectual and social context in which lawyers operate and about the challenges associated with transforming their sense of identity to incorporate a new professional role?

Reasons Behind Gaps. If gaps such as these are important, why are they generally ignored? Do current practices reflect considered decisions, unstated institutional or personal values, simple inertia, or untested assumptions about competing instructional demands?

More Uncertainties. If "thinking like a lawyer" indeed serves as a

metaphor for guiding students through areas of uncertainty as they begin to move forward on a professional path, are there other areas of uncertainty that need to be identified and more directly addressed to fuel the learning process and develop better lawyers as a result? If so, should these matters be addressed during law school's first year or at a later point?

Faculty Uncertainty. Are faculty members in turn uncertain, or convinced that there is little that can be known about student learning? If they surfaced and confronted these uncertainties, what might be learned?

Moving On. How much time and attention should be given to helping students learn to "think like lawyers," using the "case-dialogue method" to that end? Could law schools better prepare their students if they took stock of the students' abilities to engaged in higher-order thinking (comprehension, analysis, application, synethesis, and evaluation) at the end of the first year? For students who have at that point developed a solid ability to engage in analytical thinking, should advanced offerings emphasize different ways to engage in problem-solving and different developmental goals? Could students who have not mastered the basics be redirected to remedial opportunities, while others move ahead? Might faculty teaching strategies beyond the first year emphasize different approaches and objectives, such as lectures (to convey content), problem-based instruction (to challenge students to develop more comprehensive insights about "lawyering" and problem-solving), and simulations (that might develop different skills and more sophisticated approaches to applying legal principles in complex contexts)?

Goals and Assessment Beyond the First Year. Should students be assessed on how well they have developed a range of competencies (including but not limited to analytical thinking) as they move beyond the first year? What learning goals might be targeted, and how might they be used (as a basis for course objectives, or more broadly as goals for student progress in the second and then in the third year?)[87] How might such assessment be conducted? Are faculty members positioned to teach about matters other than analytical thinking, given the current composition of law faculties?

---

87. *See, e.g.* SCHULTZ & ZEDECK, *infra* note 155 (regarding competencies of effective lawyers). A growing number of law schools have embraced "learning objectives" and to develop methods for assessing and achieving such goals. *See, e.g.*, Univ. of Denver Sch. of Law, Conference on "Legal Education at the Crossroads v. 3.0: Assessment, http://www.law.du.edu/assessment-conference/program (last visited Sept. 9, 2009) (displaying extensive materials and presentations provided by faculty presenters and law schools).

6. Conclusions

Many of these questions relate to "naming." Law schools have historically been weak in articulating their institutional goals, recognizing and confronting comprehensive educational challenges facing their students, and committing to ongoing assessment of the effectiveness of their instructional programs. If it becomes possible to confront wicked problems associated with "naming" and taking responsibility for student learning, year-by-year and throughout the complete three-year law school program, significant results might be gained. Until law schools are willing to recognize that they must find and name the invisible dimensions of the educational process (as Millie had to name Rumpelstiltskin because her humanity and child's welfare depended upon it), it is unlikely that significant improvements in legal education will result. Happily, more and more faculty members and bar leaders are raising and addressing such questions. The observations provided here may assist them in their efforts at educational reform.

D. *Consider Renegotiating When You Hit a Dead End*

A crucial lesson of the *Rumpelstiltskin* story concerned the importance of renegotiating basic bargains upon hitting a dead end (as Millie did when responding to Rumpelstiltskin's demand that she give up her child). Legal education reformers need to take that lesson to heart particularly if they hope to energize the advanced curriculum and prepare students more meaningfully for actual law practice.

1. The Advanced Curriculum as Wicked Problem

The problem of the advanced curriculum[88] – its relative incoherence and failure to engage many students – is a difficult one for a number of reasons. The first year of law school is an intense and cohesive experience that reshapes students' thinking patterns and communicates overwhelming lessons regarding the nature of law (at least the common law). Students have little choice about what they will study or how they study it. They are socialized intensively into a way of life that leaves limited time to reflect and skews their sense of work/life balance.

In contrast, many students' second and third year classroom experiences are relatively dilute or packed with information without necessarily generating marked engagement. Students face few

---

88. The phrase – "the advanced curriculum problem" – is used hereafter to reference a constellation of related issues: what is included in the second and third year curriculum, how are subjects beyond those in the first year are taught, and how are upper division students engaged.

course requirements and have considerable flexibility about what they study and when. Those who did not do well academically may shop for courses or seminars they believe will bolster their grade point averages, while those who did well in the first year may conclude that the key to law school success is to keep on doing what they have done before rather than stretching their intellectual muscles. Academic and career advising is generally limited, and after the disorienting force of the first year experience, many students are at a loss about what professional path they might wish to pursue. Intensive preparation for class often goes by the wayside and students' time and attention often turns to extracurricular activities and part-time work.[89]

A variety of underlying forces contribute to this situation. The content encompassed by the upper division curriculum is both wide-ranging and difficult to categorize, for good reason.[90] The legal profession spans many types of practice and those with legal training increasingly work in a host of non-traditional settings. Society is continually changing, and the law inevitably follows suit. Faculty members have considerable autonomy in designing individual courses and have little exposure to forms of pedagogy other than those through which they themselves learned. In many law schools, instruction is split between traditional professors (who often have had little practice experience), part-time practitioners with cameo roles in a handful of advanced practice-related electives, and clinical faculty who may spend virtually full-time in clinical supervision. In many law schools, second and third year offerings are characterized by a handful of very large courses (typically in foundational areas covered on bar examinations) as well as a host of relatively small

---

89. The 2009 Law School Survey of Student Engagement Report indicated that for surveyed students, 1Ls typically spend between 21-25 hours reading assigned material, while 3Ls spent between 11-15 hours per week on such activities. 3Ls were found to spend more time on pro bono and extracurricular activities. LSSSE, Law School Survey of Student Engagement (2009), http://lssse.iub.edu/htm/about_lssse/cfm.

90. There is no readily available compilation of what is taught in American law schools beyond the first year. Several sources might be consulted but are generally not up-to-date. *See, e.g.,* AM. BAR ASS'N, SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A SURVEY OF LAW SCHOOL CURRICULA: 1992-2002 (2004) [hereinafter ABA CURRICULUM REPORT] (summarizing curricular developments from 1992-2002); Deborah Jones Merritt & Jennifer Cihon, *New Courses in the Upper-Level Curriculum: Report of an AALS Survey,* 47 J. LEGAL EDUC. 524 (1997) (summarizing trends in curricular change as of the mid-1990s); Sara K. Stadler, *The Bulls and Bears of Law Teaching,* 63 WASH. & LEE L. REV. 25 (2006) (summarizing curricular areas likely to be in demand from the point of view of new law teachers); AALS COMMITTEE ON CURRICULUM, SURVEY OF CURRICULUM INNOVATIONS (2006), http://www.aals.org/documents/curriculum/Survey.pdf. For an excellent recent discussion of curricular developments, see Toni M. Fine, *Reflections on U.S. Law Curricular Reform,* 10 GERMAN L.J. 717 (2009).

electives that are often more closely tied to individual faculty members' research interests. Standard course books in many areas continue to emphasize cases with statutory supplementation rather than embracing more comprehensive problem-based methods of organization. Single final examinations remain the norm except in "seminar" offerings.

Reforms to the first year curriculum have proved challenging, often because schools are hesitant to depart from national norms and because faculty members teaching in first year subjects tend to resist reductions in the hours assigned to foundational courses that involve both content instruction and development of critical thinking. Nonetheless, in recent years, many schools have enhanced legal writing courses, cut back on hours for classic common law courses, and introduced either public law or elective offerings to create more balance.[91]   However complex the institutional politics, first year reform seems relatively straightforward at least compared to comprehensive reform in the second and third years. Models of first year courses are increasingly available from other schools (particularly elite law schools attended by many faculty members). Faculty members appreciate incentives to reduce traditional hours if doing so cuts back on classroom hours and teaching loads, or opens fresh opportunities to teach small electives in areas related to research interests. Increasingly, too, academic support programs have developed to assist students who may not thrive on the first year curriculum as it has come to exist. In effect, first year reform is probably not a "wicked problem" of the sort defined above.

In contrast, reform of the upper division law curriculum to address student disengagement and curricular incoherence is a wicked problem par excellence. As sketched above, there are a host of factors that contribute to student disengagement (including experience in the first year, other time demands, lack of clear professional goals, poor advising and more).   The advanced curriculum is largely shaped by faculty interests, student requests, and financial resources, without a governing curriculum theory or driving educational objectives at least in most schools. Comparisons to other schools' offerings generally occur only at the course-level (rather than comparing the scope of a whole year or more comprehensive "curriculum area") so it is difficult to benchmark against peers. Improvements in the advanced curriculum typically take the form of adding courses or clinical opportunities in one or another substantive area, a process that clearly illustrates the "no stopping rule." While individual faculty members may alter their approach to instruction or coverage in specific courses, it is very

---

91. ABA CURRICULUM REPORT, *supra* note 90, at 24-28.

difficult to assess the impact of such efforts in the grand scheme of student development. Because the legal profession is itself so diffuse and far-ranging, and because professional performance reflects so many variables (not only content mastery but work ethic, personal characteristics and more), it is virtually impossible to determine how changes in the advanced curriculum affects the skills of law graduates.[92]

Are there fruitful ways to approach the "wicked problem" of the upper division curriculum despite these difficulties? Some have suggested that the solution to this conundrum is to reduce the duration of law school from three years to two.[93] For those who believe that better and more effective preparation is needed (rather than less), that strategy seem akin to giving up a treasured child for lack of imagination. The *Rumpelstiltskin* story suggests another alternative: move beyond stated assumptions, renegotiate, and discover alternative answers to underlying dilemmas. The next section suggests four strategies worth considering by those interested in upper division curricular reform.

2.   Four Strategies for Upper Division Curricular Reform

Each of the four strategies summarized below approaches the upper division curriculum problem from a different direction. The observations and examples that follow are based on site visits to schools which served as field sites for work on the *Carnegie Report*, other visits to law schools around the country, conversations with legal educators over the years, wide-ranging reading related to higher education, and ongoing work relating to curricular reform at the University of North Carolina. If experience and observation serves, it is likely that any one of these strategies, taken alone, will be inadequate to make a meaningful dent in the very difficult problem of the upper division curriculum. Meaningful resolution will more likely result only when the full range of strategies is employed

---

92. For a discussion of the construction of competence among law graduates, see Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469 (1993) (discussing results of surveys of hiring partners in Chicago in 1991, legal practitioners in Chicago admitted in the five years prior to the survey, and samples of lawyers in Springfield, Missouri and smaller Missouri communities; considering where critical skills were developed, in the opinion of practitioners; concluding that changes in law school may affect practice, but not in a monocausal fashion; and noting that lawyers at the time of the study ranked communications skills, ability to instill confidence, legal analysis and reasoning abilities, and drafting abilities, in the view of more than 50 percent of young lawyers, as extremely important).

93. *See, e.g.*, HERBERT L. PACKER & THOMAS EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION (1972); Paul Carrington, *Training for the Public Professions of the Law*, in NEW DIRECTIONS IN LEGAL EDUCATION (Ass'n of Am. Law Schools ed., 1971).

to change the deeper dynamics of engagement and incoherence discussed above.

a. Purposeful Design on a Large Scale.

Creating and Recreating Institutional Mission. Although it is not easy, some schools have shaped or reshaped their curricula very purposefully in connection with their understanding of their core mission. Field work for the *Carnegie Report* suggested that high levels of engagement and coherence were most readily found in relatively small law schools whose faculty and students continued to embrace a founding mission.

Three examples warrant brief mention. The City University of New York's (CUNY) School of Law, located in Queens, was founded very deliberately to educate primarily first-generation students of diverse backgrounds who seek to serve traditionally underrepresented members of the public.[94] The school's founding dean and faculty members sought from the outset to incorporate insights from educational theory into the school's instructional design. The school's faculty members have both significant academic talent and practice experience, and there is a strong commitment to incorporating experiential learning strategies including clinical education throughout the curriculum. The faculty appreciates the ways in which their special mix of students benefits from the integration of "hands on" learning to bolster deep understanding of the law and how it is applied. Students take pride in the school's special mission and clear identity.

North Carolina Central University School of Law (NCCU)[95] also has a mission that resonates with CUNY's. Part of a historically black university, the law school has taken considerable pride in its role in preparing minority candidates for the bar. Its evening program in turn has a special mission in assisting those who are working while completing their law degrees. Many leaders in state and local government have attended the school. During the site visit in 2000, the school had adopted a number of novel strategies for helping its students to do well on the bar examination, including a

---

94. *See, e.g.,* Charles R. Halpern, *A New Direction in Legal Education: The CUNY Law School at Queens College,* 10 NOVA L. J. 549 (1986); Kristin Booth Glen, *To Carry It on: A Decade of Deaning After Haywood Burns,* 10 N.Y. CITY L. REV. 7 (2006); *see also* Michelle J. Anderson, *Legal Education Reform, Diversity, and Access to Justice,* 61 RUTGERS L. REV. 4, 1011 (2009).

95. For history on the establishment of NCCU School of Law, see N.C. Cent. Univ., History (2007), http://web.nccu.edu/law/about/history.html; John Brittain Dean, *Black History Month Tribute to HBCU Law Schools,* 15 NAT'L B. ASS'N MAG. 10, 11-12 (2001); NCCU SCHOOL OF LAW, NCCU SO FAR: 60TH ANNIVERSARY ISSUE (2000), http://web.nccu.edu/law/pdf/alumni/NCCULaw60Anniv.pdf.

required comprehensive examination on first year subjects at the end of the first year, and a number of course requirements in the upper division (including on focused on statutory interpretation). There was a real sense of cohesion between students and faculty and a sense of mutual commitment to a shared mission that focused on student success.

The University of New Mexico School of Law (UNM) has long been known for its innovative program of legal education. [96] Once again, a sense of engagement and passion animated the work of faculty and students observed during field work conducted in spring 2000. The school is the state's only law school, it is relatively small in size, and it takes its public mission very seriously. It had a comprehensive clinical program that involved its full-time faculty and students throughout the three years of law school. Its special mission to the state's significant Native American population was evident in the inclusion of Indian law issues routinely throughout its core classes. Its faculty members have also historically been engaged in deep thinking about the nature of education, and how best to prepare their graduates, many of whom are employed in small general practice or public sector settings.

What lessons can be derived from these examples? It appears that curricular cohesion and student engagement are more easily developed in smaller law schools with a clear and well-remembered mission that seeks to prepare students (including a substantial number of those traditionally underrepresented in the bar) for law practice in settings where they need to be relatively self-sufficient. Each of these schools, at the time of the visits, were relatively under-resourced, but each had a highly-committed faculty with substantial numbers who are familiar with educational theory and who have spent considerable time in practice.

Are other schools likely to follow similar paths? At least some of those law schools that have been founded since the time of the Carnegie field work appear to resemble those just described at least to some degree. As discussed elsewhere in this symposium, Drexel has established a Co-op model that emulates that of its parent

96. For a history of the University of New Mexico School of Law, see Univ. of N.M. Sch. of Law, History of UNM Law School (2008), http://lawschool.unm.edu/about/history/index.php (last visited Oct. 14, 2009). For examples of its historical willingness to experiment with innovations in the curriculum, see, e.g., Karl Johnson & Ann Scales, *An Absolutely, Positively True Story: Seven Reasons Why We Sing*, 16 N.M. L. REV. 433 (1986) (discussing first year jurisprudence course); Antoinette Sedillo Lopez, *Making and Breaking Habits: Teaching (and Learning) Cultural Context, Self-Awareness, and Intercultural Communication Through Case Supervision in a Client-Service Legal Clinic*, 28 WASH. U. J.L. & POL'Y 37 (2008) (discussing clinical instruction).

university and is designed to integrate hands-on learning.[97] Elon University's College of Law has hired a substantial number of faculty members with significant expertise in educational theory and practice, and has endeavored to forge an educational model that focuses on leadership and professionalism.[98] Such strategies are perhaps not surprising, since law schools early in their trajectories need to create a recognizable niche that sets them apart from their competitors.

Whether well-established law schools can and will embrace such strategies are much more difficult questions. As discussed elsewhere in this symposium,[99] Northwestern has adopted a long-range plan geared to preparing its graduates to function well in corporate settings, following a careful study of what those employing many of its graduates would like to see. More complex admissions criteria will be used to screen students for related abilities, and more emphasis on finance and international experience will be incorporated into the academic program. Other large and well-resourced schools have sought to position themselves within the marketplace for student recruitment and placement in ways that resonate with their environments. For example, New York University, another of the Carnegie study schools visited in the spring of 2000, had an articulated commitment to clinical opportunities for students, integration of faculty scholars with backgrounds other than law, advanced interdisciplinary colloquia, and offerings by "global faculty" who visited on a recurring basis.[100]

These latter two examples serve as a counterpoint to those sketched earlier. Schools with substantial resources and well-established elite status may embrace change as a means of distinguishing themselves from their competitors, much as "start-up" law schools tend to do. Proclaiming a carefully-framed institutional vision may well aid recruitment of students and faculty who share it. Typically, however, adding marketing-focused opportunities such as

---

97. *See* Roger J. Dennis, *Building a New Law School: A Story From the Trenches*, 61 RUTGERS L. REV. 4, 1079 (2009).

98. For a discussion of Elon's approach to instilling professionalism using "coaching" methodology, see Leary Davis, *Preceptors, Coaches and Mentors at Today's Law Schools: The Elon and St. Thomas Examples*, 18 ABA PROF. LAW. 27, 27 (2008).

99. David E. Van Zandt, *Foundational Competencies: Innovation in Legal Education*, 61 RUTGERS L. REV. 4, 1127 (2009).

100. A description of various NYU Law School programs can be found as follows: New York Univ. Law, Global Law, http://www.law.nyu.edu/global/index.htm (last visited July 20, 2009) (describing the Hauser Global Law School Program); The Lawyering Program, http://www.law.nyu.edu/academics/lawyeringprogram/mission /index.htm (last visited July 20, 2009); *see generally* Centers & Institutes, http://www.law.nyu.edu/centers/index.htm (last visited July 20, 2009) (listing the various programs offered at NYU Law School).

those described results in added options, rather than a change at the core. For students to gain an engaged and coherent education, other steps are needed as discussed below.

The dilemmas that face most law schools (not the most elite with sufficient resources to supplement the core academic program in various high-profile ways, and not smaller schools with clearly focused missions geared to traditionally disadvantaged students) are much more difficult. Are there ways to create greater curricular cohesion and engagement using the strategies outlined here nonetheless?

There is useful literature on the circumstances in which change does or does not occur within universities and academic departments that can provide useful insights.[101] For example, either internal (leadership, institutional aspirations) or external forces (the job market) can provide a "change imperative." Different theoretical models may suggest different approaches, but one of the most compelling, traced to the work of Professor Peter Senge, stresses the importance of "systems thinking" (that concerns the interplay among a range of factors such as those characteristically at work in "wicked problems"), "mental models"[102] (that often drive individuals' views of a problem or the world at large, without anyone being aware of these significant preconceptions), and multiple "loops" of learning (closely tracking what happens in the face of change and using resulting insights to continue to improve the situation.)[103]

---

101. For a discussion of research literature about change in colleges and academic departments, see Adriana J. Kezar, *Understanding and Facilitating Organizational Change in the 21st Century: Recent Research and Conceptualizations*, 28 ASHE-ERIC HIGHER EDUC. REPORT NO. 4 (2001); WALFORD ET AL., *supra* note 25 (discussing the importance of assessing the need for change; understanding the nature of work, structures, and cultures within the unit; and the use of multiple change strategies taking into account the local situation; also noting that change may require altering the unit's environment, its people, its structure, and decision-making processes; explaining that departmental values are likely to be of considerable importance; suggesting a focus on what the department should be; and providing an overview of relevant literature); E.A. Jones, *Transforming the Curriculum*, 29 ASHE-ERIC HIGHER EDUC. REPORT NO. 1 (2002) (discussing curriculum reforms in professional fields including accounting, nursing and teaching); Adriana Kezar & Peter D. Eckel, *The Effect of Institutional Culture on Change Strategies in Higher Education: Universal Principles or Culturally Responsive Concepts?*, 73 J. HIGHER ED. 4, 435-60 (2002); Virginia S. Lee, Michael R. Hyman & Geraldine Luginbuhl, *The Concept of Readiness in the Academic Department: A Case Study of Undergraduate Education Reform?*, 73 J. HIGHER EDUC. 4, 435 (2002).

102. *See also* ROBERT KEGAN & LISA LASKOW LAHEY, IMMUNITY TO CHANGE: HOW TO OVERCOME IT AND UNLOCK THE POTENTIAL IN YOURSELF AND YOUR ORGANIZATION (LEADERSHIP FOR THE COMMON GOOD) (2009).

103. *See* PETER SENGE, THE FIFTH DISCIPLINE: THE ART & PRACTICE OF THE LEARNING ORGANIZATION (2006).

   In considering the potential for law school change at an institutional level, "mental models" may deserve special attention. There are at least two models that appear clearly to be driving educational patterns in many schools: rankings by *U.S. News & World Report* and the pursuit of prestige more generally.[104] Schools that seek to rise in the *U.S. News & World Report* rankings often reallocate funds in order to meet or influence the criteria being measured by the rankings system employed. For example, they may be hesitant to admit students with "riskier" admissions credentials, allocate money into glossy brochures to try to influence peer judgments, develop clinical programs of particular types, use or not use adjunct faculty, and decide on class sizes in hopes of climbing above competitors or rising among the tiers. There is little in *U.S. News'* ranking system to reflect meaningful educational quality, however, at least in terms of how "quality" would be adjudged based on on-site actual quality judgments by knowledgeable faculty.

   Quite apart from *U.S. News*, there are systemic factors that educational researchers have suggested have influenced universities who are "striving," that is, trying to improve how they are regarded (that is, their "prestige") within the hierarchical universe of higher education.[105] Educational institutions that are "striving" tend to display the following characteristics: placing greater emphasis on test scores in admissions decisions; giving greater attention to hiring faculty "stars"; reducing teaching loads; ratcheting up research expectations; emphasizing honors rather than developmental curricular; focusing on high prestige academic or career opportunities following graduation; and shifting resource allocations toward administration and amenities away from instruction.[106] Researchers who have studied "striving institutions" and their behavior suggest that both negative and positive effects can result. Greater emphasis on research may reduce faculty-student interaction outside of classes and change institutional culture, but may also result in professors

---

   104. For discussion of the "pursuit of prestige," see KerryAnn Meara, *Striving for What? Exploring the Pursuit of Prestige, in* HIGHER EDUCATION: HANDBOOK OF THEORY AND RESEARCH 121 (John C. Smart ed., 2007) [hereinafter *Pursuit of Prestige*]. For discussion of *U.S. News and World Report* rankings, see Andrew P. Morris & William Henderson, *Measuring Outcomes: Post-Graduate Measures of Success in the* U.S. News and World Report *Rankings*, 83 IND. L.J. 791 (2008); Jeffrey Evans Stake, *Ranking Methodologies: The Interplay Between Law School Rankings, Reputations, and Resource Allocation*, 81 IND. L.J. 229 (2006); Theodore Seto, *Understanding the* U.S. News and World Report *Rankings*, 60 S.M.U. L. REV. 493 (2007); Michael Sauder & Ryon Lancaster, *Do Rankings Matter? The Effect of* U.S. News and World Report *Rankings on the Admissions Process in Law Schools*, 40 LAW AND SOC'Y REV. 105 (2006).

   105. *See Pursuit of Prestige, supra* note 104, at 124.

   106. *Id.* at 131.

setting higher academic challenges for students.[107] Some research suggests that when faculty members are more focused on their own careers and external rankings, student learning cultures may suffer.[108] Faculty members associated with striving institutions may gain career benefits and opportunities to engage in research associated with reduced teaching loads, but may also encounter more complex reward systems, greater difficulty in achieving work/family balance, and more competitive work environments.[109] While the research is not definitive, there are suggestions that "striving behaviors" result in less involvement in service and shared governance by faculty members.[110] Striving behaviors may also affect institutional choices in student admissions and financial aid, and may stifle institutional innovation (as schools attempt to mimic those higher up the prestige scale.)[111]

These two "mental models" operate without being deliberately adopted or in many ways being confronted for the negative effects that they may create. Law schools may well wish to consider alternative mental models if they wish to claim their own creative space for education reform. For example, within the contexts of universities, some have adopted the framework of "comprehensive universities" serving a wide spectrum of students. It may be particularly suitable for some faculty members in law schools associated with institutions of this sort to focus on the "scholarship of teaching and learning"[112] as a form of rigorous scholarly inquiry as well as a means to work toward institutional improvement. Other schools that are smaller might consider identifying with the model of "liberal arts colleges" where teaching has recognized priority but important scholarly work also occurs.[113] Law schools of various sorts might also consider the broader lessons about forging and living out institutional identities that are increasingly being proposed by law schools that identify themselves as "religious"[114] or "urban."[115] It is

---

107. *Id.* at 160.

108. *Id.* at 160-61.

109. *Id.* at 162-65.

110. *Id.* at 165-67.

111. *Id.* at 167-70.

112. Bruce B. Henderson & Heidi E. Buchanan, *The Scholarship of Teaching and Learning: A Special Niche for Faculty at Comprehensive Universities?*, 48 RESEARCH IN HIGHER EDUC. 523 (2007); Edith A. Rusch & Catherine Wilburg, *Shaping Institutional Environments: The Process of Becoming Legitimate*, 30 THE REVIEW OF HIGHER EDUC. 301 (2007).

113. *See* WILLIAM G. BOWEN, MATTHEW M. CHINGOS & MICHAEL S. MCPHERSON, CROSSING THE FINISH LINE: COMPLETING COLLEGE AT AMERICA'S PUBLIC UNIVERSITIES (2009) (discussing effectiveness of various types of public universities and colleges in helping minority students to graduate).

114. *See, e.g.,* Andrew M. Moore, *Contact and Concepts: Educating Students at*

challenging to forge new mental models suitable to law schools which wish to ground themselves in a self-conscious mission and pursue action that takes that mission seriously. It is likely to be even more challenging to develop meaningful consensus within a broad-ranging group of faculty members with differing priorities, personal and professional goals. At the least, however, opening a conversation about mental models and their significance can provide options that are not considered by those who accept the generic "whatever *U.S. News* says" or "more prestige" is always better as a way of defining their institutional objectives.

Another approach is increasingly emerging based on law schools' own efforts to develop objectives and measures of desired educational outcomes. In some instances, initiatives of this sort have derived from efforts to comply with the ABA's new "outcomes" requirements.[116] In others, however, initiatives have been driven by university-wide expectations for more sophisticated program assessment efforts (either because of university-based wishes for more accountability or because regional accreditators expect that universities proceed in that way). Two excellent recent examples are evident in St. Paul, Minnesota, where both Hamline School of Law and William Mitchell School of Law have engaged in significant efforts to set institutional objectives. Hamline's progress is linked in part to university expectations,[117] while William Mitchell (a free-standing law school) has undertaken its efforts to map objectives and link educational strategies to its own ongoing efforts to provide excellent education to its students.[118] A growing number of other

Jesuit Law Schools, 41 GONZ. L. REV. 459 (2006); John M. Breen, *The Air in the Balloon: Further Notes on Catholic and Jesuit Identity in Legal Education*, 43 GONZ. L. REV. 41 (2008) (discussing schools with Jesuit and Catholic identity); John J. Fitzgerald, *Today's Catholic Law Schools in Theory and Practice: Are We Preserving Our Identity?*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 245 (2001).

115.   Joyce Sterling, Robert Dinovitzer & Bryant Garth, *The Changing Social Role of Urban Law Schools*, 36 SW. U. L. REV. 389 (2007).

116.   AM. BAR ASS'N, OUTCOME MEASURES REPORT (2009), http://www.abanet.org/legaled/committees/subcomm/Outcomepercent20Measurespercent20Finalpercent20Report.pdf.

117.   For background on Hamline School of Law's assessment efforts, see Univ. of Denver, Strum Sch. of Law, Legal Education at the Crossroads v. 3:0: A Conference on Assessment, Sept. 2009, http://law.du.edu/documents/assessment-conference/Sandeen-Getting-Buy-In-From-Your-Colleagues.pdf (last visited Sept. 17, 2009) [hereinafter Legal Education at the Crossroads]; University of Denver, Strum School of Law, http://www.hamline.edu/hamline_info/offices_services/administration/aaffairs/assessment/index.html (last visited Sept. 17, 2009).

118.   *See* Univ. of Denver, Strum Sch. of Law, Conference on Assessment, http://law.du.edu/documents/assessment-conference/Yarbrough-Building-an-Integrated-Approach-to-Assessment.pdf (last visited Sept. 17, 2009) (describing a presentation given by representatives of William Mitchell College of Law and Widener

schools have begun similar efforts or made significant progress using varying trajectories to reach their aims.[119] Ventures of this sort are most likely to succeed if there is a meaningful imperative for change, broad support on moving to address the imperative, appreciation for the complex systems that interact to create educational dilemmas and possible solutions, fresh mental models where needed, and well-conceived assessment loops to allow for continuing improvement.

i. Large Scale Reforms Focused on Progression
    From Year to Year

As discussed above, most law schools do little to distinguish between the second and third year curriculum, apart from encouraging students to take foundational courses (basic tax, business associations, evidence) in the second year if required for advanced offerings, and limiting live client clinics to the third year (if necessitated by the relevant state student "practice" rule). There are ample reasons for this system, since students often are unsure from one year to the next about what courses they wish to take (since they often do not know what kind of future professional path they will choose). Likewise, faculty members who wish to teach electives often prefer to have the maximum number of students enrolled (which means allowing both 2Ls and 3Ls to opt-in). The inevitable result is most advanced classes have a mix of second and third year students enrolled, and faculty teach to the base common denominator (expecting a middling level of performance from all, rather than raising the stakes and expectations for those in the third year).

It is at least conceivable that some other approach might be employed. *The Carnegie Report* emphasized the need to give attention to multiple "apprenticeships" during the course of law school: not only the "cognitive apprenticeship" so prominent in the first year, but also the "apprenticeship of practical skills" and the "apprenticeship of professional identity and values." The *Report* recommended greater emphasis on integrating these forms of apprenticeship throughout students' educational experience, but also noted that law schools do not give enough attention to progression beyond the first year.[120]

It is worth asking whether a differing emphasis might be placed on the dimensions of education received in the second year and the

---

University College of Law).

119. *See* Univ. of Denver, Strum Sch. of Law, Legal Education at the Crossroads v. 3.0:   A   Conference   on   Assessment,   http://www.law.du.edu/index.php/assessment-conference/program (last visited Sept. 17, 2009) (including information regarding Thomas Cooley, University of Pittsburgh, William Mitchell, Texas Southern, Drexel, University of Dayton, University of Wyoming, Hamline, and others).

120. EDUCATING LAWYERS, *supra* note 1, at 1.

third year, as the following figure illustrates:

Figure 7
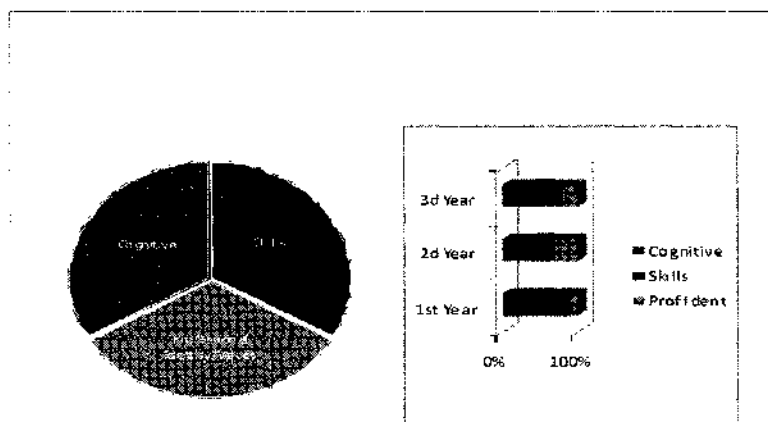
The idea would not be to devote the second and third year *exclusively* to one or the other of these distinctive arenas, but rather to create a decided *emphasis* in the second and third years in order to provide a source of distinctive cohesion and engagement once students have mastered the fundamental analytical approach that is so predominates in the first year and beyond.

Washington and Lee's College of Law provides an example of this kind of approach, one that focuses on making the third year of law school distinctive and expecting students to perform at a level appropriate to transition into practice. The school has adopted a program, entering its initial year, in which third year students will enroll beginning in 2009-2010.[121] In its pilot year, the program is structured to provide participating students with two five-unit "practica" courses (some of which may use clinical or externship formats). In addition, students will enroll in a two-week "skills immersion module" at the start of each semester (one focusing on transactional skills and the other on litigation-related skills). Students will also take a two-hour "professionalism" course that will run throughout both terms, and engage in various forms of public service including work with student groups or external groups.

Washington and Lee may be distinctively positioned to embark on this kind of experiment. The school has a very small student body and a strong resource base. Its relatively remote location in the

---

121. *See* Washington and Lee Sch. of Law, The New Third Year: A Message From the Dean, http://law.wlu.edu/thirdyear/ (last visited on July 20, 2009).

Virginia mountains makes it difficult to provide ample clinical opportunities unless strong partnerships are forged with those elsewhere to provide a range of learning options. It remains unclear whether and how the second year's curriculum might change in response to such a marked shift in the approach adopted in the third-year curriculum.

While it is logical to treat the third year as a focal point for intensive work on the "apprenticeship of practical skills," such an approach raises additional questions. What kind of strategy needs to be employed in the second year of law school, when students must make a transition from "thinking like students" newly trained in intensive legal analysis to serving as "apprentice lawyers" in the third year with a significant appreciation for professional norms and a modicum of practice-related skills and appreciation for clients? Can students who are unsure of their interests and career trajectories be helped during the second year to choose among alternative areas in which to gain intensive "lawyering" experience? Is a second year of law school devoted to foundational bar courses and some electives sufficient to provide the content-oriented instruction beginning lawyers need in order to build substantive expertise? Would something less than full-scale immersion throughout the third year in placements of the sort envisioned by Washington and Lee provide sufficient to prepare students to enter the profession if their law school lacks similar resources or if their interests have yet to mature?

While emphasizing different educational goals during the third year of law school is certainly important, it is probably not enough. If students are to be given a meaningful opportunity for engagement and coherence, it makes little sense to wait to provide that opportunity until their third year. Second year typically represents a critical turning point in students' personal and professional trajectories.[122] Those who achieved distinction in first year grades

---

122. Data from the Law School Survey of Student Engagement is particularly helpful in tracking changes in students from one year to the next. *See* LSSSE, Student Engagement in Law School: Preparing 21st Century Lawyers, http://lssse.iub.edu/2008_annual_report/index.cfm (last visited July 20, 2009). The schools participating in this survey vary from year to year, and the focus of yearly annual reports tends to differ as well. For example, the 2008 annual report focused in particular on legal writing and computer use. *Id.* The 2007 report focused on subsets of students by age. *Id.* at http://lssse.iub.edu/2007_annual_report/index.cfm. The 2006 report focused on the influence of faculty and peers. *Id.* at http://lssse.iub.edu/2006_annual_reports/index.cfm. The 2005 report focused on differences in student experiences in each law school year. *Id.* at http://lssse.iub.edu/2005_annual_reports/index.cfm.

The 2005 report reported, for example, that class preparation fell off significantly (from 93 percent of full-time 1Ls who said they were never or only sometimes

may conclude that they are destined for stardom and devote themselves to law review activities and job searches geared to large firms. Those who have had less academic success as measured by their grade point averages are often more at sea and may immerse themselves in other sorts of extracurricular activities or seek out part-time employment opportunities to demonstrate a level of distinction and rebuild faltering self-esteem.[123] If students do not have a strong sense of themselves, their interests, and their intrinsic motivations, they may end up drifting without grappling with critical questions about where their professional future should lie.

There is therefore a case to be made that the second year of law school should provide students with an opportunity to grapple with their own doubts and questions about how they might fit within the legal profession. If schools have not taken significant steps to help students engage with the "apprenticeship of professional identity and values," they may need to take considered steps to do so during the second year. Indeed, it is possible to imagine a second year emphasis that would embrace this dimension of students' preparation in very whole-hearted ways.

Students might be expected to take courses in "professional responsibility" or the "legal profession," perhaps geared to specific areas of practice, in order to help them understand the range of professional opportunities they might pursue.[124] Students' interest

---

unprepared to 84 percent for full time 2Ls to 74 percent for full-time 3Ls). When asked whether they worked harder than they thought they could to meet faculty members' expectations, a significant drop-off was also reported among full-time students (for 1Ls, 61 percent said yes, compared to 49 percent of 2Ls and 46 percent of 3Ls). With regard to preparing two or more drafts of papers, a similar pattern was evident (69 percent of full-time 1Ls reported that they did so, compared to 56 percent of 2Ls and 55 percent of 3Ls). Student use of time also changed markedly across the years across a number of categories: reading for class (full time 1Ls reported spending 21 hours per week compared to 17 hours for 2Ls and 13 hours for 3Ls); extracurricular activity participation (2 hours per week for 1Ls compared to 5 hours per week for 2Ls and 3Ls); and working in a legal job (1 hour per week for 1Ls increasing to 4 hours per week for 2Ls and 7 hours per week for 3Ls).

Parallel data is not included in the 2008 annual report, but raw national data made available to participating schools indicated that similar trends existed then. As to whether students came to class fully prepared, 92.2 percent of 1Ls said they were never unprepared or only sometimes unprepared, compared to 82.3 percent of 2Ls and 75.2 percent of 3Ls). As to whether they worked harder than they thought they could to meet faculty members' expectations, 63.2 percent of 1Ls said they always or often did, compared to 51.9 percent of 2Ls and 46.9 percent of 3Ls.

123. For a discussion of studies of law student depression, see *infra* note 199 and accompanying text.

124. For a recent thoughtful exploration of different pedagogies that might be used to teach effectively in the area of professional responsibility, see Anita Bernstein, *Pitfalls Ahead: A Manifesto for the Training of Lawyers*, 94 CORNELL L. REV. 479, 508 (2009). *See also* John Conley, *How Bad is it Out There?: Teaching and Learning About*

in pro bono work might be given a higher profile and turned into a more significant learning opportunity if linked to courses in legal ethics, perhaps for "add on" credit when ethical lessons are brought home through contact with clients in need.

Many students demonstrate strong interest in a variety of extracurricular activities, in part because they wish to explore their interests and potential professional roles. Unfortunately, many such activities take place without meaningful involvement of faculty advisers, and leave students without a good sense of how their interest in professional roles and opportunities might intersect with academic offerings.

Some law schools have begun to develop strategies for linking students' professional interests with academic offerings, extracurricular activities, and engagement with members of the profession, beginning as early as second year. Among those visited during the *Carnegie Report* fieldwork in 1999-2000, Santa Clara University School of Law stands out as an excellent example. Faculty members, nearby lawyers (in the Silicon Valley of California), and students interested in intellectual property issues developed opportunities for integrated extracurricular programming (including writing opportunities and joint dinner programs) and course sequences that allowed students with demonstrated interest and strong performance to come together in a consistent way to explore related issues, beginning in the second year. Students therefore had recognized opportunities for showing their distinction and working in a community of professionals who shared their interests. Rather than waiting until their third year, they could explore the professional roles and possibilities associated with intellectual property practice and move along a trajectory in which they would be expected to set and raise their expectations for themselves.

In short, it is clearly possible to develop strategies for drawing students into areas of professional interest and introducing them to notions and examples of professionals in their chosen field well before their final law school year. The best approaches tend to emulate "learning communities" that link students with faculty and legal professionals, raising expectations for what is expected as students continue to build expertise throughout their law school careers.[125]

---

the State of the Legal Profession in North Carolina, 82 N.C. L. REV. 1943, 1943 (2004) (discussing innovative "law firm" course).

125. The notion of "learning communities" has been ably described by Professor Paula Lustbader. *See, e.g.*, Paula Lustbader, *Walk the Talk: Creating Learning Communities to Promote a Pedagogy of Justice*, 4 SEATTLE J. SOC. JUST. 613 (2006).

The term learning community has varying definitions and has been applied to different learning environments. At the undergraduate level, a learning

To summarize, big picture strategies are important, at least conceptually. They can help law schools, their faculty, students, and alumni come together around a core mission, and drive resource allocation to achieve set objectives. They can also provide a point of reference for meaningful assessment of the extent to which objectives have been achieved. Schools with clear and well-remembered missions tied to preparing students for practice settings in which recent graduates will be expected to take principal responsibility for client affairs have a better chance than others in retaining their focus, particularly when their faculty members are also committed to a related social justice mission and have a meaningful mix of academic and practice-related experience. It is typically harder for other law schools to embrace a focused mission particularly when they are affected by competition among diverse objectives held by faculty and students, and are inexorably pulled toward conformity with reigning assumptions about stature and prestige. Attending to potential differences between second and third year curricula has proved a challenge to law schools to date, since nearly all rely on a cafeteria menu approach to enrollment, unless required to limit clinical participation by third year practice rules. Nonetheless, greater attention is needed to distinguish between second and third year classes in order to set appropriate expectations and objectives for student learning in these settings.

b. Re-Thinking Content

Another important strategy for addressing the advanced curriculum is to re-think content: what gets taught, by whom, and when. College faculty members periodically explore what should be included in "general education" requirements for all undergraduates, with an eye to what an educated person should know, leaving questions about what various majors require to individual

---

community often refers to the creation of cohorts of students, who take a grouping of two or more courses organized around an interdisciplinary curriculum. Sometimes, there is also an intentional building of community through extracurricular activities as well. The purpose of these learning communities is to enhance learning and foster connections of disciplines, students, and faculty. The pedagogy employed in these communities is active and promotes reflection.

Id. at 626. *See also* Paula Lustbader, *You Are Not in Kansas Anymore: Orientation Programs Can Help Students Fly Over the Rainbow*, 47 WASHBURN L. J. 327, 355 (2008) (discussing learning communities in the context of orientation programs). For a discussion of learning communities in undergraduate education, see, e.g., Chun-Mei Zhao & George D. Kuh, *Adding Value: Learning Communities and Student Engagement*, 45 RESEARCH IN HIGHER EDUC. 115 (March 2004) (discussing benefits of "learning community" model including stronger student engagement, educational outcomes, and satisfaction).

departments or schools.[126] Law faculty members have tended to ask somewhat different questions, even though they are charged by accrediting groups with periodically reviewing school curricula.[127] If debates occur, they tend to center upon what is required during the first year of law school, and perhaps whether additional requirements should be imposed for advanced students.[128] Rarely does the discussion center on what "a well-educated lawyer should know." Indeed, in many instances, the responsibility for that decision is left to the bar examiners, and students are often advised to take some number of the pertinent courses offered by their school or be ready to study hard during the intensive process of reviewing for the bar.[129] By and large, however, the trend has been away from

---

126. For a summary of recent trends in undergraduate general education, see HART ASSOCS., TRENDS AND EMERGING PRACTICES IN GENERAL EDUCATION: TRENDS AND EMERGING PRACTICES IN GENERAL EDUCATION: BASED ON A SURVEY AMONG MEMBERS OF THE ASSOCIATION OF AMERICAN COLLEGES AND UNIVERSITIES (2009), http://www.aacu.org/membership/documents/2009MemberSurvey_Part2.pdf (describing common learning outcomes for undergraduates, including emphasis on science and technology, applied knowledge in real-world settings, critical thinking and analytical skills, communication skills, and global issues; emphasizing global courses, first year seminars, diversity, engaged and experiential learning; systematic assessment). *See also* James L. Ratcliff, D. Kent Johnson, Jerry G. Gaff, *Changing General Education Curriculum*, 2004 NEW DIRECTIONS IN HIGHER EDUC. 1 (2004) (discussing trends in general education).

127. The Association of American Law Schools requires periodic review of the curriculum as part of its membership requirements. *See* ASS'N OF AM. LAW SCHS., BYLAWS 6-7(b), http://www.aals.org/about_handbook_requirements.php ("The curriculum of a member school shall be the result of a curriculum planning process by the faculty, which shall include a periodic review of the curriculum for its content and pedagogical effectiveness."). The American Bar Association has a similar requirement. *See* AM. BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS (2008-09), std. 302-8, http://www.abanet.org/legaled/standards/20082009StandardsWebContent/Chapterpercent203.pdf ("A law school shall engage in periodic review of its curriculum to ensure that it prepares the school's graduates to participate effectively and responsibly in the legal profession.").

128. The American Bar Association has reported a decline in curricular requirements beyond the first year. *See* AM. BAR ASS'N SECTION ON LEGAL EDUC. AND ADMISSIONS TO THE BAR, A SURVEY OF LAW SCHOOL CURRICULA: 1992-2002, 15-16 (2004) (explaining that thirty-four law schools had no requirements beyond professional responsibility and writing courses after the first year; of the 118 schools with requirements beyond the first year apart from these requirements, eighty required constitutional law and seventy-one required evidence; as constitutional law has migrated to the first year, fewer schools have imposed advanced requirements).

129. For a discussion of factors affecting bar passage at one Midwestern law school, see Douglas Rush & Hisako Matsuo, *Does Law School Curriculum Affect Bar Passage? An Empirical Analysis of Factors Affecting Bar Examination Passage During the Years 2001 Through 2006 at a Midwestern Law School*, 57 J. LEGAL EDUC. 224 (2007) (analyzing bar exam passage of graduates of St. Louis University School of Law on the Missouri bar examination, and concluding that there was no statistically significant correlation between enrollment in upper division "bar courses" and passage of the bar

requiring courses other than professional responsibility and typically some additional course with a writing component beyond the first year.[130]

Both faculty members and students are drawn to clustering courses by subject area. For faculty members, having a number of colleagues in a given field often adds to the quality and impact of scholarly work since there is a greater potential for colleagues in a particular field to recognize a given school and its faculty as having distinction in a given field. For students, there is a tendency to seek schools known for strengths in a given content area, since many students believe that "majoring" in a particular field will bring greater prospects of employment and provide a focus for study (much as specialization in one or more majors has guided their undergraduate careers and the careers of friends who have gone on to Ph.D. programs).

Law schools as institutions are also drawn to claiming expertise in particular content areas. For some schools, that is a way to achieve distinction within *U.S. News & World Report* rankings, even if the school is not generally high in the pecking order. For others, claiming specialized expertise is a means of marketing themselves as excelling in a particular field whatever the overall quality of their students and programs. Yet others are called by their parent universities to develop strengths that complement strengths elsewhere in the university, sometimes through joint degrees or "concentrations" acknowledged on diplomas. Joint or dual degrees can be particularly beneficial to mature students who have found a considered interest in a particular field and want to express their commitment and enhance their preparation in an area they would like to pursue.

Some schools have accordingly encouraged faculty members to engage in considered efforts to develop sequences of courses or advanced concentrations and joint degree programs in particular fields.[131] Such approaches can benefit the school, its faculty and students by demonstrating pride of place and advancing faculty and

---

exam, since nearly 75 percent of graduates ranking in the bottom 10 percent of their class failed the bar exam notwithstanding having enrolled in "bar courses").

130.   *See* ABA CURRICULUM REPORT, *supra* note 90, at 15-19.

131.   *See id.* at 32; Vanderbilt University School of Law Academic Programs, http://law.vanderbilt.edu/ academics/academic-programs/index.aspx (last visited Aug. 26, 2009) (linking to various advanced course concentrations); Univ. of Dayton Sch. of Law, Curricular Tracks,http://law.udayton.edu/NR/exeres/D614B214-EDF9-420D-AE4D630B139 0B7C6.htm (last visited July 22, 2009) (linking to various advanced course concentrations) .

student recruitment compared to others institutions.[132]   Without
doubt, they are often used by many schools as a marketing strategy
insofar as they reflect a point of distinction that may not be shared
by other schools.

It remains uncertain, however, whether legal employers care
very much about this kind of concentrated substantive preparation
for practice, when compared to other factors affecting hiring
decisions.   Studies of the "Beyond the J.D." law graduates'
experiences suggest that the factors that most influence employers in
hiring are the schools attended by prospective associates, and the
social class of those being recruited to elite firms.[133]

Even if there were an employability rationale for such efforts,
this approach will not necessarily resolve the problems of cohesion
and disengagement in the advanced curriculum. In order for students
to opt into a sequence of courses, they need to know that the
particular sequence relates to their personal core interests,
something they may not really know until they have explored several
possibilities. By second and third year, students generally become
more anxious about how their learning relates to their future
professional careers, particularly if they have had some exposure to
professional work during the summers or part-time work during the
year.[134]   Factors unrelated to content often affect their choices,
however, for example the time a class is offered, the teacher's
reputation, the intensity of work required, and selection patterns
among students' friends.

Absent intrinsic student interest in particular subject matter, it
may be difficult to address the disengagement common after the first
year unless more attention is given to pedagogy and rebalancing the
responsibilities of teachers and students as discussed below.

---

132. *See* Michael Olivas, *Majors in Law? A Dissenting View*, 43 HARV. C.R.-C.L. L.
REV. 625 (2008) (discussing the rationales and drawbacks of concentrations).

133. *See* David Wilkins et al., *Urban Law School Graduates in Large Law Firms*, 36
SW. U. L. REV. 433 (2008) (providing detailed statistical analysis of factors influencing
hiring); Robert Nelson, *The AJD Project: The First National Longitudinal Study of
Lawyer Careers* , 36 SW. U. L. REV. 355 (2008) (discussing background of the After the
J.D. project, key data and conclusions); Joyce Sterling et al., *The Changing Social Role
of Urban Law Schools*, 36 SW. U. L. REV. 389 (2007) (discussing patterns involving
urban law schools); RONIT DINOVITZER et al., AFTER THE J.D.: FIRST RESULTS OF A
NATIONAL STUDY OF LEGAL CAREERS (2004), http://www.americanbarfoundation.org/
uploads/cms/documents/ajd.pdf   (providing overview of study and key findings)
[hereinafter AJD STUDY].

134. *See supra* note 122 (describing responses of first, second and third year
students to the LSSSE survey); AJD STUDY, *supra* note 133, at 81 (listing law
graduates' ratings of various dimensions of law school experience, and indicating that
the two most helpful experiences were summer employment and school year
employment, followed by clinical courses, legal writing, internships, upper division
lectures, course concentrations, first year curriculum, legal ethics, and pro bono).

c. Rethinking Pedagogy

Much has been written about legal pedagogy, often focusing on techniques that can be employed by law teachers who want to be more effective in the classroom.[135] This essay does not endeavor to re-plow that ground, but rather commends this substantial literature. Instead, it focuses on three dimensions of pedagogy that may helpfully serve as points of entry in addressing the advanced curriculum's "wicked problems": theoretical developments related to student engagement, the role of instructional objectives, and the potential for imagining and embracing new conceptions of course design.

i.   Student Engagement

The notion of "student engagement" has drawn considerable attention among college leaders, in part because assessment strategies have been developed in the past decade to articulate and measure the quality of students' educational experiences at the college level, using this formulation. The Pew Charitable Trusts,[136] Professor George Koh, an educational researcher at Indiana University-Bloomington,[137] and the Carnegie Foundation for the Advancement of Teaching,[138] among others, have been identified with an ongoing effort to make crucial dimensions of students' educational experience visible and to track the extent to which these experiences are provided at various schools. Key dimensions tracked by the "National Survey of Student Engagement"[139] include the level of

---

135. There are numerous books and articles on teaching techniques. *See, e.g.,* STEVEN FRIEDLAND & GERALD HESS, TEACHING THE LAW SCHOOL CURRICULUM (2004); MICHAEL HUNTER SCHWARTZ, SOPHIE SPARROW & GERALD HESS, TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM (2009); STUCKEY ET AL., *supra* note 5; MUNRO, OUTCOMES ASSESSMENT FOR LEGAL EDUCATION (2000); Institute for Law Teaching and Learning, http://lawteaching.org/teaching/ index.php (last visited July 23, 2009) (including numerous bibliographies and other resources).

136. The Pew Charitable Trusts began the initiative in 1998, in part to counter *U.S. News & World Report* rankings that relied heavily on quantitative measures without directly addressing quality. *See* National Survey of Student Engagement, Our Origins and Potential, http://nsse.iub.edu/nsse_1999/concept.cfm (2009).

137. *See, e.g.,* George D. Kuh, *The National Survey of Student Engagement: Conceptual and Empirical Foundations, in* 2009 NEW DIRECTIONS FOR INSTITUTIONAL RESEARCH NO. 141, 5 (2009) (providing overview); George Kuh, *What We're Learning About Student Engagement from NSSE: Benchmarks for Effective Educational Practices,* 35 CHANGE: THE MAG. OF HIGHER LEARNING 24 (2003).

138. *See* Carnegie Foundation for the Advancement of Teaching, www.carnegiefoundation.org (last visited July 23, 2009).

139. National Survey of Student Engagement, http://nsse.iub.edu (last visited July 23, 2009).

academic challenge, opportunities for active and collaborative learning, students' interaction with faculty members, enriching educational experiences, and supportive campus environment.[140]

"Student engagement" may in fact reflect a variety of factors, including student motivation as well as educational opportunities provided, contributions by other students, and institutional structures outside the classroom. Indeed, research that preceded the development of the NSSE instrument considered such matters as students' time on tasks, attendance, positive emotional tone, and cognition of metacognitive strategies.[141] The movement toward measuring engaged experiences reflects more recent trends that attend to learners' own experiences as a means of determining the high-quality dimensions of their education, rather than taking a more mechanical approach. Similarly, researchers have recognized that positive experiences (such as that of "flow" in various settings)[142] can provide a satisfying lure for continuing involvement with a sport or other enjoyable activity.

Moreover, the phrase "student engagement" may be used by different people to refer to different phenomena. In a thoughtful article, Professor Stephen Bowen suggested that a crucial question that should not be forgotten is "engagement [by students] with what"? He suggested that there are at least four possibilities: student engagement with the learning process itself (are students active in learning?), student engagement with the object of study (are students stimulated by gaining direct experience with something new?), student engagement with the context of the subject of study (exposure to field experiences for example), and finally student engagement with the human condition itself (including its social, cultural and civil dimensions).[143] Bowen notes, in addition, that

---

140. For a discussion of underlying conceptual issues and changes in the survey over time, see Nat'l Survey of Student Engagement, Information for Researchers, http://nsse.iub.edu/html/researchers.cfm (last visited Aug. 27, 2009). Since the first administration in 2000, more than 1300 colleges and universities have administered the NSSE instrument, often repeatedly. *Id.* The instrument itself is available on the NSSE website. National Survey of Student Engagement, http://nsse.iub.edu/html/ survey_instruments_2009.cfm (last visited Aug. 27, 2009). Often, entering students complete a companion assessment instrument in order for colleges to compare their views as entering freshmen and graduating seniors. There is also a "faculty survey" that has been developed in order to allow faculty and student observations to be compared. Faculty Survey of Student Engagement, http://fsse.iub.edu/index.cfm (last visited Aug. 27, 2009).

141. ELAINE CHAPMAN, ASSESSING STUDENT ENGAGEMENT RATES (2003), http://www.ericdigests.org/2005-2/engagement.html.

142. *See* M. CSIKSZENTMIHALYI, FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE (1990).

143. Stephen Bowen, *Student Engagement: Are We All on the Same Page? Peer Review,* 7 J. ASS'N. AM. COLLEGES. & UNIVS. 2 (2005).

these dimensions of "student engagement" may themselves be referred to with different terminology: engagement with the learning process is sometimes thought of as "active learning" with the object of study as "experiential learning," with contexts as "multidisciplinary learning" that is not bound by one academic discipline, and with social and civic context as "service learning."[144]

Legal educators would be well-advised to reflect on these dimensions of student engagement. They may, for example, encourage their schools to participate in the "Law School Survey of Student Engagement" (LSSSE) that was developed based on the NSSE framework and has been available since piloted in 2003-04.[145] The LSSSE survey provides a snapshot at the institutional level of student experiences within a given law school (level of interaction with faculty on various points, extent to which class preparation varies from year to year, involvement in pro bono and extracurricular activities, student work patterns, perceived effectiveness of writing programs, and more). LSSSE also provides an opportunity to benchmark against other institutions (the full array of those administering the survey in a given year, as well as designated peers, peers based on size, and public versus private affiliation). At the institutional level, schools can use this instrument to pinpoint issues influencing student engagement in the second or third year, and to measure the impact of possible changes.

For faculty members interested in addressing issues of engagement in individual courses, LSSSE provides useful information but does not drill down to the course level. Work of educational researchers using the NSSE framework may, however, provide food for thought on this matter.[146] The researchers developed a course engagement survey and used it to assess engagement in lower-level college mathematics and psychology courses. They found four different forms of engagement in the classroom setting: (a) "skills engagement" (including attending class and taking good notes to understand the material presented); (b) "emotional engagement" (including really wanting to learn the material and thinking about it between course sessions); (c) "participation/interaction engagement" (including volunteering in class, talking with the instructor, working with classmates); and (d) "performance engagement" (doing well in the class, being confident, having extrinsic motivation).[147] The work of other educational researchers explains underlying dynamics by

---

144. *Id.* at 7.

145. LSSSE, http://lssse.iub.edu/index.cfm (last visited Aug. 27, 2009).

146. M. Handelsman, W. Breiggs & N. Sullivan, A. Towler, *A Measure of College Student Course Engagement*, 98 J. OF EDUC. RES. 3, 184 (2005).

147. *Id.* at 186-88.

noting that students can be motivated by setting affirmative goals that involve multiple progressive goals (drawing them on), triggering creativity by challenging preconceptions, reinforcing interest through cooperative techniques, and reinforcing achievement through use of frequent performance-based assessments that determine accomplishment on an absolute scale rather than evaluating in comparison to others.[148] Needless to say, relatively few advanced law school classes fill this bill, since students generally keep preparing as they were taught to in the first year, are rarely given truly creative tasks or expected to work cooperatively, and are assessed using one-shot traditional exams where they are graded on a curve.

It is evident that these factors likely correspond with students' experience in successfully negotiating first year courses that employ the "case dialogue" method successfully so as to involve a wide range of students.[149] On the other hand, those teaching advanced courses beyond the first year may be able to find alternative means to "engage" students using this framework. Those interested in taking on this significant challenge may be able to return to the literature on teaching methods and see it in a new light, focusing their efforts on pedagogical strategies with an eye to the forces that foster student engagement.[150]

---

148. See Martin V. Covington, *A Motivational Analysis of Academic Life in College,* in THE SCHOLARSHIP OF TEACHING AND LEARNING IN HIGHER EDUCATION: AN EVIDENCE-BASED PERSPECTIVE 661 (R.P. Perry and J.C. Smart eds., 2007) (discussing various motives for learning; suggesting that motives be viewed as goals rather than "drives;" describing the effects of engaging educational tasks that involve multiple progressive goals, creativity as a result of challenging preconceptions, and social reinforcement through cooperative learning; providing positive reinforcers including use of "absolute" rather than relative grading schemes, and more frequent rewards/assessments; and the use of success oriented assessments including formative assessments geared to performance indicators so that students have a means of continuing to strive).

149. See discussion *supra* Part II.C.4.

150. Pedagogy is, of course, not the only factor affecting students' experiences in law school. A recent study by psychologists of two cohorts of students entering an elite urban law school found that negative identity-relevant events adversely affected student engagement over time. See Bonita London et al., *Psychological Theories of Educational Engagement: A Multi-Method Approach to Studying Individual Engagement and Institutional Change,* 60 VAND. L. REV. 455 (2007). The study used background surveys, a diary and interview protocol to explore student experiences. *Id.* at 468. In particular, the study focused on several different kinds of factors that can influence student engagement: institutional factors (grading and evaluation procedures, diversity in the law school environment); situational factors (pedagogical practices, and culture of competition or collaboration); and individual factors (competence beliefs, concerns and expectations of bias, and coping with bias). *Id.* at 457-60. The authors asked students to document their experiences in the first three weeks of school and then interviewed students at the end of the first semester and at the end of the first year to see how these events had ultimately affected students. The

ii.   Instructional Objectives and Intentionality.

One of the surprising gaps in the pedagogy employed by many law professors is the failure to recognize that instructional objectives are worth consideration and can make a difference in many ways.[151] Effective instruction generally requires setting goals, developing strategies for achieving those goals, and assessment that measures whether goals have been achieved.[152] In legal education, however, many faculty members simply assume that they are teaching core subject matter, try to do so as effectively as possible, and employ multiple-choice or essay examinations to determine whether students have learned something (often blunting that inquiry by simply "sorting" those who learned more or learned less, consistent with grading curves).

For those in other fields, however, a more self-conscious process of setting objectives, designing strategies to meet these objectives, and assessing student performance with the objectives in mind has

---

authors concluded that the vast majority of experiences related to individual students' social identities, concerned classes or work, involved peers or professors, and affected respondents' sense of competence and willingness to engage. *Id.* at 476-79. A number of leading faculty at elite schools have similarly stressed the adverse effect of institutional factors, pedagogy, and student experiences on students' sense of well-being and engagement, particularly during the first year. As discussed below, students' identities and developmental experiences can have a significant bearing on learning. *See supra* text accompanying notes 240-60. For purposes of this section of the analysis, however, the focus is on engagement beyond the first year, and steps that might be taken to engage students at that point in their law school careers. LSSSE surveys endeavor to explore students' educational experiences in contrast to the psychological considerations discussed in the study described in this note. At the same time, LSSSE responses are analyzed in terms of demographic factors as well (race, gender, age, and so forth), and the LSSSE survey specifically asks students about issues relating to diversity and their experiences with peers, faculty, and administrators. These are important aspects of LSSSE and should be carefully considered by participating schools. They are difficult to aggregate in a meaningful way for present purposes, however, and are beyond the scope of this article.

151.   *See* MUNRO, *supra* note 135, at 31-42 (2000) (discussing weak assessment practices in law schools); *id.* at 133 ("[T]eachers need first to make their goals and objectives explicit and then to get specific, comprehensible feedback on the extent to which they are achieving those goals and objectives.") (citing THOMAS ANGELO AND PATRICIA CROSS, CLASSROOM ASSESSMENT FOR TECHNIQUES: A HANDBOOK FOR COLLEGE TEACHERS 7-11 (1993)); STUCKEY, *supra* note 5, at 28-36 ("The educational goals of most law schools in the United States are articulated poorly, if at all. This is one of the primary reasons why most law school curriculums can best be described as chaotic: they lack cohesion, coordination, and common purpose, especially after the first year.").

152.   *See* MUNRO, *supra* note 135, at 81-104 (discussing assessment cycle, beginning desired outcomes, assessment, and action to improve student learning); *see generally* GRANT WIGGINS & JAY MCTIGHUE, SCHOOLING BY DESIGN: MISSION, ACTION, AND ACHIEVEMENT 129 (2005) (discussing teacher's job as teaching to cause a result).

become increasingly common.[153]   Asking about instructional objectives in a given advanced course is often a useful thought experiment, even if nothing different is done with course design or assessment as a result.

Professor Barbara Glesner-Fines of the University of Missouri-Kansas City has spoken thoughtfully and effectively about this issue. For example, she has suggested twenty questions a faculty member might ask in thinking about course design and related objectives, including questions relating to the expectations of students taking a given course (why do they take it? what does the bar examination expect them to know?); subject matter (what should students remember in three years? what do you cover and why?); skills (what skills do the students exercise in the course? what do they bring, practice, master?); values and attitudes (what do they misunderstand? who are their future clients? who are the lawyers they encounter in the course and what are the professional values? what central dilemma do such lawyers confront and how can students confront and resolve it in the course?).[154] These questions become even more salient for those who are involved in substantive "concentrations" or sequences of courses, since they can clarify what questions and issues are addressed from one course to the next in order to enhance student learning throughout.

Even if an individual instructor has imagined a range of objectives for a given course, it is worth considering whether some objectives that law faculty members may not often have considered would be worth taking into account and addressing in courses where they could be especially pertinent. Two means of doing so are worth suggesting here.

Marjorie Schultz and Sheldon Zedeck, researchers at the University of California-Berkeley, have recently completed initial work identifying and framing important dimensions of lawyer effectiveness with support from the Law School Admissions Council.[155] They interviewed lawyers, judges and laypeople about
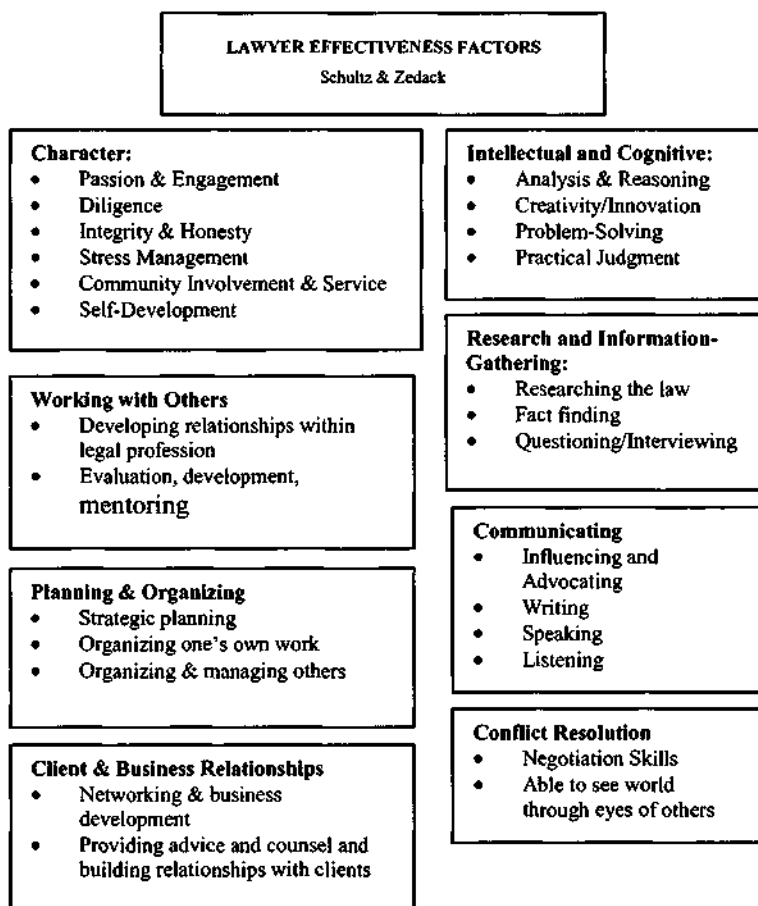
---

153. *See, e.g.*, SHERI SHEPARD ET AL., EDUCATING ENGINEERS (2009) (discussing practices in engineering).

154. *See* Barbara Glesner-Fines, Presentation to Conference at University of Washington School of Law: Legal Education at the Crossroads (2008), *available at* http://bestpracticeslegaled.albanylawblogs.org/events-presentations-2/past-events/.

155. *See* MARJORIE SCHULTZ & SHELDON ZEDECK, IDENTIFICATION, DEVELOPMENT, AND VALIDATION OF PREDICTORS FOR EFFECTIVE LAWYERING (2008), http://www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf. In important respects these factors parallel the lawyering skills and values discussed in STUCKEY, *supra* note 5. The MacCrate legal skills included problem solving, legal analysis, legal research, factual investigation, communication, counseling, negotiation, familiarity with litigation and alternative dispute resolution methods, ability to organize and manage legal work, and ability to recognize and resolve ethical dilemmas. Fundamental

the dimensions in which lawyers need to be effective in their professional lives. They then grouped these "lawyer effectiveness" factors in clusters. The clusters included the following dimensions of "lawyer effectiveness":

Figure 8

LAWYER EFFECTIVENESS FACTORS
Schultz & Zedack

Character:
- Passion & Engagement
- Diligence
- Integrity & Honesty
- Stress Management
- Community Involvement & Service
- Self-Development

Working with Others
- Developing relationships within legal profession
- Evaluation, development, mentoring

Planning & Organizing
- Strategic planning
- Organizing one's own work
- Organizing & managing others

Client & Business Relationships
- Networking & business development
- Providing advice and counsel and building relationships with clients

Intellectual and Cognitive:
- Analysis & Reasoning
- Creativity/Innovation
- Problem-Solving
- Practical Judgment

Research and Information-Gathering:
- Researching the law
- Fact finding
- Questioning/Interviewing

Communicating
- Influencing and Advocating
- Writing
- Speaking
- Listening

Conflict Resolution
- Negotiation Skills
- Able to see world through eyes of others

Even if a law school does not institutionally take up the responsibility for preparing its graduates along one or more of these dimensions, individual faculty members may seek to do so if the

values cited by the *MacCrate Report* include commitment to maintaining competence and representing clients competently; promoting justice, fairness and morality; improving the profession and remedying bias; and continuing to develop professionally.

courses they teach resonate with goals such as those noted above.

While it remains unclear how individual schools will engage their faculty members in taking responsibility for attaining specific institutional objectives, in some schools there has been important headway. If a school sets goals for its graduates, faculty members may see how those goals resonate with their individual courses (even if they may not have seen these possibilities before). Moreover, efforts to address such objectives by more than one faculty member can create important synergies and are more likely to achieve the school's overall objectives, particularly if both faculty members and students join in efforts to achieve what is proposed.

iii.   Re-Conceptualizing Course Design

A final dimension of pedagogical reform involves re-conceptualization of course designs. Increasingly, law faculty members appreciate the potential of various forms of practice-oriented instruction, including "live client" clinics, externships, and simulation courses.[156] For some law schools, the conversation about enhancing student engagement may therefore center on how to add more clinical offerings, externships, simulation courses, or other forms of applied/practice-oriented instruction[157] to the second and third year. Although these strategies are certainly worthy ones, they

---

156. *See, e.g.,* Eliot Milstein, *Clinical Legal Education in the United States: In-House Clinics, Externships, and Simulations,* 51 J. LEGAL EDUC. 375, 376 (1991) (describing the traditional division of "clinical" education in the United States at that time in the following terms: "clinical programs" built around an actual law office, usually located in the law school, exists for the purpose of providing students with a faculty-supervised setting within which to practice law and learn from the experience. Students learning in *externship programs* are placed in professional settings external to the law school, including law offices within governmental agencies and nongovernmental organizations. Law schools use the students' experience in those offices as the basis for teaching and learning. *Simulation* is a teaching method in which students are put into simulated lawyer roles to perform some aspect of the lawyering process in a controlled setting. Each of these uses the students' experiences as the subject matter for analysis, both within and outside the classroom).

157. As discussed below, it is evident that the traditional tripartite classification of "clinical education" has begun to break down as more forms of "experiential learning" and practice-oriented instruction is integrated into the traditional curriculum. In addition, a recent survey of clinical programs in the United States found a complex picture when seeking descriptions of existing "clinical programs." *See* Becky L. Jacobs, *A Lexical Examination and (Unscientific) Survey of Expanded Clinical Experiences in U.S. Law Schools,* 75 TENN. L. REV. 343 (2008) (citing "lexical" challenges arising in her effort to compile empirical information about clinical offerings at the top 100 law schools; explaining that some of these challenges stem in part from the impact of U.S. News rankings, varying roles of clinical faculty, and unclear descriptions of formats of existing programs; and noting that even within the community of clinical faculty there are disagreements on the characteristics of particular educational offerings that are needed to justify designation of such a program as a "clinic.")

risk perpetuating the artificial split between "theory" and "practice" without considering the opportunities for creative synergies yet to be explored.

The Theory/Practice Divide. One of the banes of legal education has been the false dichotomy between theory and practice.[158] Although law schools have increasingly attempted to bridge this unfortunate gap, institutional politics and separatist policies continue to play a role in keeping "stand up" faculty from fully appreciating those who teach in clinical and legal writing courses, and vice versa.[159] Significant insight into ways to address this dilemma can be gained through better understanding of the several "modalities" of knowing and learning, using lenses understood in classical Greece. A very brief précis can prove helpful here as a means of explicating this continuing divide and providing a foundation for deciphering the confounded and confounding ways in which legal educators have commonly used these terms.

In his quest to understand and explain the options available to those who would choose a good life, Aristotle focused on three types of knowledge, each defined in terms of the purpose to be served.[160]

> *Theory* ("theoria") derived from contemplation, and involved the search for truth through contemplation in order to attain knowledge for its own sake. Theory generally took the form of abstract, general rules, guided by pure reason and particular forms of intellectual activity (*episteme*). Certain disciplines were associated with theory (such as philosophy and pure mathematics). A life devoted to theory was regarded as the best and the intellectual virtues associated with it as the most valued. Educators, who impart theoretical knowledge and inculcate intellectual virtues, are thus engaged in the highest and most "god-like" of callings ("theo," the root of "theory" referring to god).

---

158. For a thoughtful discussion of the theory/practice division by a leading clinical professor, see Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577 (1987). For additional writing on this crucial dilemma, see J. P. Ogilvy & Karen Czapanskiy, *Clinical Legal Education: An Annotated Bibliography: Part Three*, 12 CLINICAL L. REV. 101 (2005) (synopses of articles, essays, books and book chapters). This essay does not endeavor to reiterate the many important points made in others' writing about the divide, but simply offers a different "take" on the causes of its persistence and potential ways to begin conversations to bridge this continuing gap.

159. For a recent discussion of the history of debates about accreditation and American Bar Association requirements for more secure status for clinical faculty, see Peter A. Joy, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183 (2008).

160. ARISTOTLE, THE NICOMACHEAN ETHICS OF ARISTOTLE (David Ross trans., 2009). See Book VI generally (discussing right reason), and more specifically Chapters 3 and 6 (discussing "scientific knowledge" and "knowledge"), Chapter 4 (discussing "making" and art), and Chapters 5 and 10 (discussing "practical wisdom").

Theory is often associated with declarative knowledge that can be readily transferred from teacher to student. It has also increasingly been associated with the written word.

Productive action (poiesis) has a distinctive purpose—the creation of a product through the process of "making" something, be it poetry, art, or "products" of other sorts (sometimes referred to as "artifacts"). Such action was thought to be guided by an underlying idea or plan regarding the desired outcome, and was executed through technical skill *(techne)* associated with the particular craft. This form of knowing or reasoning has been described as instrumental, since it involves the interplay between idea and capability. It inevitably has three components, however – the idea, the techniques used in the "making" and the "product" or performance that results. Technique improves through repeated production, and production is in turn improved by enhanced technique. Productive action is sometimes associated with disciplines such as engineering.

Practice (praxis) has as its goal the resolution of human problems and the cultivation of "practical wisdom" or "judgment." This way of knowing was associated by Aristotle with ethical and political life (such as the exercise of governmental leadership) – the life of action. It quintessentially concerns an individual's encounter with a question or problem rooted in a specific context, for which no known answer is readily apparent. Instead, the individual needed to be guided by a moral disposition and a capability to interpret the unclear and fluid setting *(phronesis)*, while engaging in detached analysis and observation. The ultimate outcome was guided by a complex interplay of detachment and action – understanding, interpretation, reflection, application and skill. At one time, "practice" was thought to entail mere application of previously encountered "theories" in a relatively passive sense. Over time, it was reinterpreted, however, and its relation to theory has commonly been seen in different terms. In many arenas, theory can only be derived from information and experience with real-life problems encountered in the "practical" realm, just as "practice" should be guided by the continuing evolution of cutting-edge theory.

A modest illustration that should ring true to many faculty members may prove useful to clarify the concepts just discussed. A faculty member beginning a major scholarly project is likely to be familiar with "theory" in the area based on prior reading or experience. He or she may seek to write a traditional type of law review article on a particular question or problem that has proved puzzling or intriguing in the past. As the work progresses, the shape of the problem seems to shift and more research is needed to fill in gaps or reshape central arguments. Perhaps a colleague makes suggestions or an unexpected development arises in the form of new legislation or fresh insights from a scholar previously unknown. The

ultimate thesis of the article may differ significantly from the original expectation. Revision after revision may give it clearer and better form.

This example thus demonstrates the interrelation of the several modes of knowing just described. It is evident that "theory" provides a starting place for cutting edge inquiry, since it reflects the accepted knowledge of the day. Obviously, however, it is not static; rather, it is continually refined through the very process of scholarly "practice" and "production." The "production" of scholarly writing takes more than good grammar and ability to type. It reflects not only technical skill in execution, but creative insight guided by important underlying ideas (the subject under consideration, an approach to analysis, a research plan, and an understanding the form in which ideas should ultimately be communicated). The "practice" of high-quality scholarship involves a creative and inquiring frame of mind, a capacity to name and then reframe a given problem, a way of "reading" the intellectual and real world encountered, integrity and courage that permits learning from false starts and dead ends on the way to developing new judgments about how best to resolve the question at hand. The experience of scholarly inquiry shared by nearly all academics should thus confirm the multiple modalities of "knowing" and "learning" that are intertwined in the development of sophisticated, context-based expertise.

Notwithstanding their own experience, legal educators and other university faculty have engaged in debate over the relative role of "theory" and "practice" for many years. It has long been common in academia to look down on "practice," carrying forward the Aristotelian preference for the intellectual life (and associated forms of declarative, written knowledge) to which academics commit themselves. Much like the blind men and the elephant, however, some academics have been blind to the multiple dimensions of these concepts or assumed in error that the terms employed refer to similar things.

The term "practice" has a variety of off-putting connotations for those to whom "theory" has great appeal. "Practice" suggests (often tedious) repetition, an unappealing prospect for those whose gifts tend to include quick leaps of imagination or the rapid intuitive grasp of ideas. "Practice" also suggests "practical" with resonance of the mundane. "Practical skills" are often thought to be those that are not, cannot, and should not be the province of the academy, the stuff of which drudgery, not dreams, is made. "Practice," too, is often seen to be the province of vocational or trade associations (the practicing bar), or the pressured large-firm culture, an arena that lofty academics have eschewed or from which they have fled.

On another level, a hesitancy to embrace "practice" in the law

school context may reflect discomfort with those of other socio-economic classes or professional profiles, with the term a proxy for divisions of a deeper sort. Modern practice-oriented legal education is often associated with the rise of clinical education in the 1960s and 1970s, during a time when foundations and the federal government funded efforts to reduce poverty and the legal establishment allowed legal aid societies and law schools to take on clients without the means to pay. Those who entered the academy as clinical faculty in that era brought with them a commitment to service and a pragmatic hope to educate young lawyers while providing needed services to the poor. Differences in academic credentials, professional experiences, values and priorities thus marked the beginning of practice-oriented instruction in recent memory, and preconceptions dating from that era may influence the ability of many to look beyond resulting chasms to this day.

Small wonder, then, that many legal academics have had little inclination to probe the potential of "productive" or "practical" knowledge as modalities that might enrich teaching and student learning beyond the first year. Aristotle's root appreciation for additional modalities of knowing suggest that there is something here to be explored, however. Both "productive" and "practical" knowing inherently involve active engagement. Both suggest that such engagement can give rise to new means of knowing, as technique and judgment are enhanced through experience with projects and problems that relate to the real world. At the very least, these further modalities of knowing are ones that are little explored or developed during the first year and thus provide an opportunity for stretching students' mind and enhancing their capabilities thereafter in novel and important ways.

New Course Models for Engaged Learning. Many "stand up" faculty members in courses outside clinics should be less reticent to take to heart the possibilities evident in clinical, externship and simulation pedagogy, or in the increasing possibilities for new models beyond these. For example, Professor Gari Blasi has articulated the important ways in which developing a "theory of the case" in clinical settings requires and builds integrated understandings of content, application of legal principles, ability to construct arguments and documents, and client-relations skills.[161] Professors Eliot Milstein and Sue Bryant have demonstrated the ways in which "rounds" can be used in both clinical and non-clinical settings to explore theory,

---

161. *See* Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory,* 45 J. LEGAL EDUC. 313 (1995); *see also* Jean R. Sternlicht, *Symbiotic Legal Theory and Legal Practice: Advocating a Common Sense Jurisprudence of Law and Practical Applications,* 50 U. MIAMI L. REV. 707 (1996)

cultural assumptions, doctrinal principles, and much more.[162]

Some of the sense of classic divisions between "clinical" teaching models and "stand up" teaching models has also come in for fresh scrutiny and imaginative reconsideration. Increasingly, leading clinicians have begun to explore fresh ways of imagining applied learning to foster development of students' professional skills without limiting themselves to the traditional categories of "live client clinic," "externship" and "simulation." For example, Professor Deborah Maranville has suggested that the traditional categories are misleading and the focus should instead be directed toward educational goals that seek to generate passion within students, provide context for learning, and teach lawyering skills.[163] Professor Harriet Katz has proposed an alternative framing of design options to include: "real case practice experience" with clinics or externships, skills-focused simulations, practice-context simulation courses (which might be described as "practica"), doctrinal courses with skills exercises, and critical analysis of lawyering skills in doctrinal courses.[164] Professor Mary Lynch has suggested an alternative matrix that suggests that course design might be viewed along a spectrum that considers the structure and supervision of learning, whether instruction is "context-based," whether students engage in simulated or live interaction with clients, and whether students assume or reflect on lawyers' or related roles.[165] Others imagine a spectrum in pragmatic terms, considering practical options for integration of lawyering practice into traditional classes.[166] The clinical community remains in active conversation about many of these questions of objectives and designs, but increasingly doctrinal faculty members are joining in.

---

162. Susan Bryant & Elliot Milstein, *Rounds: A "Signature Pedagogy" for Clinical Education?*, 14 CLINICAL L. REV. 195 (2007).

163. *See* Deborah Maranville, *Passion, Context, and Lawyering Skills: Choosing Among Simulated and Real Clinical Experiences*, 7 CLINICAL L. REV. 123 (2000) (arguing that students might be introduced to real practice earlier in law school and that relatively unsupervised or paid internships can have benefits); Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning*, 51 J. LEGAL EDUC. 51 (2001) (expanding on relationship between experiential learning strategies and clinical programming of various sorts).

164. *See* Harriet Katz, *Evaluating the Skills Curriculum: Challenges and Opportunities for Law Schools*, 59 MER. L. REV. 909 (2008).

165. Post by Professor Mary Lynch to the "Best Practices for Legal Education Blog," http://bestpracticeslegaled.albanylawblogs.org/2009/08/22/terminology-and-meaning-experiential-learning-context-based-lawyering-role-structured-supervision/ (last visited Sept. 12, 2009).

166. *See, e.g.,* Alice M. Noble-Allgire, *Integrating the Law School Curriculum: How to Integrate More of the Skills and Values Identified by the* MacCrate Report *into a Doctrinal Course*, 3 NEV. L.J. 33 (2002-2003).

　　　Another emerging theme is the recurring interest of many faculty members in use of the "problem method"[167] or a different type of "case method" akin to that practiced in business schools. Advocates for using a "problem method" date back nearly one hundred years.[168] In a recent review of the "problem method," Professor Shirley Lung has traced discussions about the virtues and risks of that method over many years.[169] The AALS appointed committees to consider the use of the "problem method" in both the 1940s and 1960s,[170] and individual professors have also explained the merits and risks of the problem method approach in ensuing years.[171] Lung cites three major claims on behalf of the problem

---

　　167. For a definition of the "problem method," see Myron Moskowitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. OF LEGAL EDUC. 241, 250 (1992) (explaining that the problem method involves a complex situation such as a lawyer would encounter in practice, featuring several issues that cut across cases and statutes; problems are distributed in advance and serve as the focus of class discussion; also referencing AALS 1942 report on problem method which defined the "problem method" as involving four characteristics: (a) reasoning versus memory of information, (b) conduct versus information for its own sake, (c) natural setting for learning versus artificial setting for learning, and (d) the priority of the problem versus the priority of principles.)

　　168. *See* Henry Winthrop Ballantine, *Teaching Contracts with the Aid of Problems*, 4 AM. LAW SCH. R. 114 (1916) (advocating for companion use of problems); *see also* David F. Cavers, *In Advocacy of the Problem Method*, 43 COLUM. L. REV. 449, 455 (1943) (discussing benefits of problem method).

　　169. *See* Shirley Lung, *The Problem Method: No Simple Solution*, 45 WILLAMETTE L. REV. 723 (2009).

　　170. *See* ASS'N OF AM. LAW SCHS., 1942 REPORTS OF COMMITTEES 8; ASS'N OF AM. LAW SCHS, 1966 PROCEEDINGS PT. 1, REPORT OF THE COMMITTEE ON TEACHING METHODS, THE PROBLEM METHOD SURVEY AND APPRAISAL (1966).

　　171. *See* J.H. Landman, *The Problem Method of Studying Law*, 5 J. LEGAL EDUC. 500 (1953) (criticizing the Langdellian case method and arguing for the use of "real" cases reflecting genuine unresolved disputes that would permit the use of the "scientific method" as applied to a significant problem, require more of students who would be expected to consider responses beyond the answers they may have read in judicial opinions, provide students with experience in applying the law of their jurisdiction, help them master skills of research, allow incorporation of "extra-legal knowledge" from other disciplines, dispel the notion that the law operates within artificial doctrinal compartments, help students deduce general principles of law, help students learn to solve and present legal problems, further the development of the law in individual jurisdictions, and prepare students for practice more effectively); Moskowitz, *supra* note 167 (discussing use of "problem method" in legal education and tracing the use of the "problem method" in various law schools); Cynthia G. Hawkins-Leon, *The Socratic Method-Problem Method Dichotomy: The Debate Over Teaching Method Continues*, 1998 BYU EDUC. & L.J. 1 (1998) (discussing goals and potential concerns about the problem method including time demands, greater suitability to small classes, constraints on use of lectures, and coverage constraints); Stephen Nathanson, *The Role of Problem Solving in Legal Education*, 39 J. LEGAL EDUC. 167 (1989) (discussing development of problem-solving program at Canadian law school); Gregory L. Ogden, *The Problem Method in Legal Education*, 34 J. LEGAL EDUC. 654

method: it requires active participation (not just observation); challenges students to develop legal skills in context rather than relying on knowing legal rules; and facilitates self-directed learning.[172]   She also notes problems associated with the method, including those associated with vicarious learning (what do students draw from experience with a given problem when no explicit framework is given?), and potential problems with transfer of relevant insights from one problem to another (the challenges of dealing with abstraction and contextualization).[173]   Nonetheless, Lung suggests that there are steps that professors can take to make the problem method more effective, including guiding students toward deep structure and prompting students to learn through metacognitive strategies.[174]   Although advocates for the problem method do not necessarily distinguish between its use in first year or advanced courses, many of the concerns noted by Lung might more readily be addressed if students have already mastered basic analytical reasoning.   Use of the problem method could also provide an important change of pace beyond the first year and engage students afresh in active learning once the "case-dialogue method" has lost its charm.

Two additional points are worth raising for faculty members interested in employing the problem method, particularly in classes beyond the first year.   A number of faculty members[175] and law schools[176] have advocated for formal programs that train law

---

(1984) (discussing merits of problem method).

172.   Lung, *supra* note 169, at 734-39.

173.   *Id.* at 739-48.

174.   *Id.* at 748-66.

175.   *See, e.g.,* Carrie Menkel-Meadow, *Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?,* 6 HARV. NEGOT. L. REV. 97, 97-98 (2001); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving,* 31 UCLA L. REV. 754 (1984).

176.   California Western School of Law was an early advocate for focused instruction in problem solving. *See, e.g.,* James M. Cooper, *Toward a New Architecture: Creative Problem Solving and the Evolution of Law,* 34 CAL. W. L. REV. 297 (1998) (discussing problem solving skills in the practice of law, legal education, and other professional fields); Janeen Kerper, *Creative Problem Solving vs. the Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf,* 34 CAL. W. L. REV. 351 (1998) (introducing the emergence of problem solving as a response to the need for change in legal education); Thomas D. Barton, *Conceiving the Lawyer as Creative Problem Solver,* 34 CAL. W. L. REV. 267 (1998) (discussing symposium issue on creative problem solving); Phyllis C. Marion, *Problem Solving: An Annotated Bibliorgraphy,* 34 CAL. W. L. REV. 537 (1997-1998). For a discussion of Case Western Reserve's Problem Solving Curriculum, see Kenneth R. Margolis, *Turning Law Students into Lawyers,* THE COMPLETE LAWYER (2007). Harvard Law School has also recently introduced instruction in problem solving as part of an intersession program for first year students.

students to be "problem-solvers" (one of the skills recognized as important by the *MacCrate Report*). As a result, law schools and their faculty may increasingly wish to consider curricular initiatives that both employ the "problem method" of instruction and teach students to think as "problem solvers" rather than litigators. Those interested in these issues should also consider the increasing breadth of literature regarding the use of different sorts of "case methods" in business, public administration, and education programs, among others.[177] The development of cases for instructional purposes outside of law schools has been treated as a scholarly undertaking, often embraced by faculty members working with advanced graduate students.[178] Law schools, faculty members, and publishers interested in fostering this form of innovative scholarship and teaching will need to find ways of encouraging the development of complex case studies that would be suitable for use in these diverse ways.

Other formats for integrating professional skills development with doctrinal instruction also deserve attention. Complex practicum simulations have been developed by some law schools, most notably William Mitchell College of Law in St. Paul, Minnesota.[179] Others have developed more targeted "practica" that emphasize the use of simulation methods in conjunction with courses targeting particular

---

177. For discussion of use of the business school case method, see Benjamin H. Barton, *A Tale of Two Case Methods*, 75 TENN. L. REV. 233 (2008); Gregory Mitchell, *Case Studies, Counter-Factuals, and Causal Explanations*, 152 U. PA. L. REV. 1517 (2004); ROBERT K. YIN, CASE STUDY RESEARCH: DESIGN AND METHODS (2009); LAURENCE E. LYNN, TEACHING AND LEARNING WITH CASES: A GUIDEBOOK (1999); MARY A. LUNDEBERG, WHO LEARNS WHAT FROM CASES AND HOW?: THE RESEARCH BASE FOR TEACHING AND LEARNING WITH CASES (1999); LOUIS BARNES, C. ROLAND CHRISTIANSON & ABBY J. HANSEN, TEACHING AND THE CASE METHOD: TEXT, CASES, AND READINGS (1994); ANN SWEET, DAVID A. GARVIN & C. ROLAND CHRISTENSEN, EDUCATION FOR JUDGMENT: THE ARTISTRY OF DISCUSSION LEADERSHIP (1992); GARY D. FENSTERMACHER & JONAS F. SOLTIS, APPROACHES TO TEACHING: THINKING ABOUT TEACHING (1998); Lee Shulman, *Just in Case: Learning from Experience*, in JOEL COLBERT, KIMBERLY TRIMBLE & PETER DESBERG, THE CASE FOR EDUCATION: CONTEMPORARY APPROACHES FOR USING CASE METHODS 197 (1996).

178. For examples of case studies developed by faculty members, see the Univ. of Va., Darden School of Business, https://store.darden.virginia.edu (last visited Sept. 12, 2009); Harvard Business School Cases, http://hbsp.harvard.edu/product/cases (last visited Sept. 12, 2009); John F. Kennedy School cases, http://www.ksgcase.harvard.edu (last visited Sept. 12, 2009), Univ. of Wash., Evans School of Public Affairs, "Electronic Hallway" Cases, https://hallway.org/index.php?PHPSESSID=vsgm21ki9r9a67 ebcts4jt5fn4 (last visited Sept. 12, 2009).

179. *See* John O. Sonsteng et al., *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303 (2007); John Sonsteng et al., *Learning by Doing: Preparing Law Students for the Practice of Law*, 21 WM. MITCHELL L. REV. 111 (1995) (discussing William Mitchell's complex simulation program).

substantive contexts.[180] American law schools have yet to approach the ingenuity evident among some schools in Europe, most particularly the University of Strathclyde, under the leadership of Professor Paul Maharg, and other professional programs using simulations to provide instruction in complex legal problem-solving.[181] Nonetheless, important efforts are underway in fields such as family law to develop effective problems for integration into courses, based on contributions of problems by faculty members from a wide range of schools.[182] In addition, some schools have begun to consider whether comprehensive simulations and other course designs may be feasible to introduce students to transactional and litigation-oriented lawyering skills.[183]

Other initiatives are underway that involve partnering among traditional doctrinal, clinical, adjunct, and legal writing faculty members.[184] The potential here is enormous, since there is a wide array of options for partnering. For example, doctrinal faculty members might partner with an adjunct or legal writing professor to provide optional writing or skills-related instruction for an additional credit associated with a substantive course, or might consult with

180. *See, e.g.*, Susan R. Martyn & Robert S. Salem, *The Integrated Law School Practicum: Synergizing Theory and Practice*, 68 LA. L. REV. 715 (2008) (discussing method for creating one-hour practicum requiring students to develop workshops on advance directives in conjunction with two-hour substantive course in bioethics and the law).

181. *See* PAUL MAHARG, TRANSFORMING LEGAL EDUCATION: LEARNING AND TEACHING THE LAW IN THE EARLY TWENTY-FIRST CENTURY 153 (2007) (discussing simulation initiatives); Karen Barton, Patricia McKellar & Paul Maharg, *Authentic Fictions: Simulation, Professionalism, and Legal Learning*, 14 CLINICAL L. REV. 143 (2007). Increasingly, college educators in the United States have begun to explore the potential for complex on-line simulations as a means for fostering applied learning. *See, e.g.*, SimTeacher.com: An On-line Simulation Tool for Teacher Education, http://www.springerlink.com/content/dt577432465q4177/fulltext.pdf?page=1 (last visited Sept. 12, 2009); public health simulation games related to flu pandemics, including "The Great Flu" of 1918, http://www.thegreatflu.com (last visited Sept. 12, 2009); Pandemic Game, http://www.zmangames.com/boardgames/pandemic.htm (last visited Sept. 12, 2009); Virtual Trial Project, http://unc.renci.org/support/virtualtrial (using "second life" to develop strategy for involving "virtual jurors" in trial team competition preparation).

182. *See* Family Law Education Reform, http://www.flerproject.org/?q=node (last visited Sept. 12, 2009).

183. *See* Stephen Gerst & Gerald Hess, *Professional Skills and Values in Legal Education: The GPS [General Practical Skills] Model*, 43 VAL. U. L. REV. 513 (2009) (discussing program at Phoenix International School of Law).

184. *See, e.g.*, Sarah O'Rourke Schrup, *The Clinical Divide: Overcoming Barriers to Collaboration Between Clinics and Legal Writing Programs*, 14 CLINICAL L. REV. 301 (2007) (discussing collaboration between legal writing faculty and clinical faculty); Susan E. Thrower, *Teaching Legal Writing Through Subject-Matter Specialities: A Reconception of Writing Across the Curriculum*, 13 J. LEGAL WRITING INST. 3 (2007) (discussing methods for legal writing professors to collaborate with doctrinal faculty).

such colleagues to develop an practical skills exercise that would be incorporated into a substantive course with or without designated credit.

Other options are available to law schools that have begun to re-examine the limitations imposed by the traditional semester-long format for instruction. Schools using inter-sessions or "modular" instruction may be well-positioned to develop short courses in lawyering skills to be taught by adjuncts in active practice or teams of traditional faculty members and practitioners interested in developing simulation offerings or advanced courses that integrate both theoretical and practice-related perspectives.

Law schools should likewise consider new ways of framing course formats to take into account some of the experimentation already afoot. For example, large lecture courses designed to impart information have a definite place in the upper division curriculum when content-delivery and explication is the core objective. It makes little sense to try to use the "case-dialogue method" in such settings if students would be better served with gaining clear knowledge of key principles (assuming that they have already mastered the intricacies of case analysis in the first year), and providing strong content-oriented instruction through lectures may open the way for advanced instruction in other courses using other more suitable methods.[185] Law schools should also consider whether the potent metaphor of "laboratories" or "studios" used in the sciences, social sciences, architecture, and creative arts might be used to re-conceptualize upper division courses. Currently, many law schools incorporate advanced seminar requirements as a means of providing students with advanced instruction in writing.[186] Unfortunately, the pedagogy used in such settings is not always carefully explored. Some seminars provide students with an opportunity to engage with advanced topics of interest to faculty members in light of research objectives. In such cases, there is not always much attention given to the parallel objective of teaching students to write and research at an advanced level. Other small-enrollment offerings are sometimes offered in a format combining lecture and discussion, without taking advantage of the opportunities for sophisticated intellectual development that might be made available to students in such settings. Still other small-enrollment offerings may take the form of

---

185. For a discussion of effective strategies for lecturing, see BARBARA GROSS DAVIS, TOOLS FOR TEACHING 97 (1993); DONALD A. BLIGH, WHAT'S THE USE OF LECTURES? (2000).

186. For discussion of instruction in seminar contexts, see Phillip C. Kissam, *Seminar Papers*, 40 J. LEGAL EDUC. 339 (1990) (discussion of teaching in advanced seminars); Philip C. Kissam, *Conferring with Students*, 65 UMKC L. REV. 917 (1996-1997).

"practica" in which faculty members give students multiple writing assignments geared to particular areas of practice (such as estate planning). What is missing in many of these small-section settings is the kind of collegial collaboration found in "studio" offerings in architecture or similar fields in which students and faculty members together take on significant applied problems, divide responsibilities, and subject their work to review and critique by expert practitioners.[187]

For law schools that currently employ only semester-length course offerings, it may prove more difficult to experiment with new formats such as those sketched above. A useful approach may be for schools to consider development of inter-session and "mini-session" offerings as a format for experimentation in which several faculty members or faculty members and practicing lawyers might work together to begin to develop new instructional designs such as those proposed.

At the end of the day, however, engagement with teaching is essential in order to engage students. Studies of college teaching and learning indicate that good teaching practices can make a significant difference in student learning. For example, the "Seven Principles of Effective Teaching," articulated by Chickering and Gamson based on a synthesis of years of research about undergraduate education,[188] reflect common wisdom that has also increasingly drawn the attention of law professors.[189] These principles include several that

---

187. For a discussion of the "studio culture" and methodology in architecture, see Toward an Evolution of Studio Culture: A Report of the Second AIAS Task Force on Studio Culture, https://www.acsa-arch.org/files/resources/AIAS_Towardpercent 20anpercent20Evolutionpercent20ofpercent20Studiopercent20Culture_2008.pdf (last visited Sept. 12, 2009) (discussing "best practices" in studio instruction in architecture).

188. A. Chickering and Z. Gamson, *Seven Principles of Good Practice in Undergraduate Education*, 39 AAHE BULLETIN 3-7 (1987).

189. A Journal of Legal Education symposium in 1999 considered each of the principles of good practice. *See* Gerald F. Hess, *Seven Principles for Good Practice in Legal Education – History and Overview, in Seven Principles for Good Practice in Legal Education,* 49 J. LEGAL EDUC. 371 (1999); Susan B. Apel, *Principle 1: Good Practice Encourages Student-Faculty Contact, in Seven Principles for Good Practice in Legal Education,* 49 J. LEGAL EDUC. 371 (1999); David Dominguez, *Principle 2: Good Practice Encourages Cooperation among Students, in Seven Principles for Good Practice in Legal Education* 49 J. LEGAL EDUC. 371 (1999); Gerald F. Hess, *Principle 3: Good Practice Encourages Active Learning, in Seven Principles for Good Practice in Legal Education,* 49 J. LEGAL EDUC. 371 (1999); Terri LeClerq, *Principle 4: Good Practice Gives Prompt Feedback, in Seven Principles for Good Practice in Legal Education,* 49 J. LEGAL EDUC. 371 (1999); Lawrence R. Dessem, *Principle 5: Good Practice Emphasizes Time on Task, in Seven Principles for Good Practice in Legal Education,* 49 J. LEGAL EDUC. 371 (1999); Okianer Christian Dark, *Principle 6: Good Practice Communicates High Expectations, in Seven Principles for Good Practice in Legal Education,* 49 J. LEGAL EDUC. 371 (1999); Paula Lustbader, *Principle 7: Good*

relate directly to engaged teaching: encouragement of student-faculty contact, emphasis on active learning, provision of prompt feedback, communication of high expectations, and respect for diverse talents and ways of learning. Other research has studied institutional cultures in order to understand the factors that influence the extent of faculty engagement in teaching.[190] In particular researchers of higher education have attempted to probe the dimensions of "culture" that influence faculty members' attention to and views about teaching.[191] John Braxton, among others, has suggested that there are several dimensions that shape the "teaching culture" in academic units, including commitment and support from high-level administrators, involvement of faculty members in efforts to improve teaching, definitions of "scholarship" that include the potential for work on the scholarship of teaching and learning, expectations regarding colloquia or teaching demonstrations as part of the hiring process, collaboration among faculty members regarding teaching, attention to faculty development, supportive and effective leadership, and connections between evaluations of teaching and tenure and promotion.[192] Law schools have yet to consider the implications of considerations such as these.

Practice Respects Diverse Talents and Ways of Learning, in Seven Principles for Good Practice in Legal Education, 49 J. LEGAL EDUC. 371 (1999); Paula Lustbader, *Conclusion: Adapting the Seven Principles to Legal Education, in Seven Principles for Good Practice in Legal Education,* 49 J. LEGAL EDUC. 371 (1999); Faculty Inventories, *Seven Principles for Good Practice in Legal Education,* 49 J. LEGAL EDUC. 371 (1999).

190. *See, e.g.,* Paul D. Umbach & Matthew R. Wawrzynski, *Faculty Do Matter: The Role of College Faculty in Student Learning and Engagement,* 46 RES. IN HIGHER EDUC. 153 (2005) (providing literature review and analyzing the interplay of student responses to the National Survey of Student Engagement and faculty responses to a companion survey of faculty views; concluding that there is a close correlation between faculty and student assessments about effective teaching and learning, a relationship between levels of challenge set by faculty members and student learning gains, and distinctive differences in institutional cultures and emphases particularly with regard to liberal arts colleges compared to others); W. J. McKeachie, *Good Teaching Makes a Difference—and We Know What It Is, in* THE SCHOLARSHIP OF TEACHING AND LEARNING IN HIGHER EDUCATION: AN EVIDENCE-BASED PERSPECTIVE 45 (R.P. Perry and J.C. Smart eds., 2007) (reviewing evidence relating to teacher effectiveness and learning results); M.W. LaCelle-Peterson & Martin J. Finkelstein, *Institutions Matter: Campus Teaching Environments' Impact on Senior Faculty, in* 1993 NEW DIRECTIONS FOR TEACHING AND LEARNING NO. 55, 21 (M.J. Finkelstein & M.W. LaCelle-Peterson eds., 1993).

191. *See* Paul D. Umbach, *Faculty Cultures and College Teaching, in* THE SCHOLARSHIP TEACHING AND LEARNING IN HIGHER EDUCATION: AN EVIDENCE-BASED PERSPECTIVE 263 (R.P. Perry & J.C. Smart eds., 2007); John M. Braxton, *Toward a Theory of Faculty Professional Choices that Foster Student Success, in* HIGHER EDUCATION: HANDBOOK OF THEORY AND RESEARCH (J. C. Smart ed., 2008).

192. Braxton, *supra* note 191, at 189-91.

d. Rebalancing Teaching and Learning Responsibilities

One last set of strategies is essential if the "wicked problem" of the advanced curriculum is to be resolved. Gradually, many college and university educators have begun to appreciate that there are various mental constructs for what happens in the classroom, and that these constructs entail more teacher-centered or more learner-centered ways of seeing the educational enterprise.[193] Faculty may focus more on their role of transmitting knowledge, their relations with their students (teacher-focused conceptions), or may instead focus on students (whether they are engaged and whether they learn). As policy-makers and accreditors who oversee higher education move more toward focusing on outputs (not just inputs), legal educators should expect to encounter similar calls for institutional accountability. Indeed, the ABA has recently issued a report on outcomes assessment in connection with law school accreditation,[194] and a growing number of regional accreditors and parent universities are asking law schools to attend to these issues as well.

Despite this seeming sea change, it is important to bear in mind that however talented and committed instructors may be and however attuned they are in assessing student outcomes, learning will occur most effectively if students join forces toward achieving desired learning in the end. Thus, it is important to consider how legal education reformers might galvanize students themselves to become more committed learners beyond the first year of law school, if the upper division curriculum dilemma is actually to be resolved. In effect, a more active and meaningful partnership is required between law schools and their students for improvements to occur. At least three factors thus need to be considered: the general characteristics and expectations of law students as learners, the developmental trajectories that affect learning and engagement in the early adult years, and the strategies that might be employed in helping students seize the day and shape better futures on their own behalves.

i. Law Student Characteristics and Desires

A variety of studies on law student and attorney characteristics have been summarized in law review articles over the years, but it should be noted that much of the empirical work addressed was conducted twenty to thirty years ago and changes in society may have affected how it should be applied today. Professor Susan

---

193. *See* Gerlese S. Akerlind, *A New Dimension to Understanding University Teaching*, 9 TEACHING IN HIGHER EDUC. 1364 (2004).

194. *See* discussion of ABA outcomes requirements, *supra* note 116.

Daikoff summarized studies of law student and attorney characteristics bearing on professionalism.[195] For example, surveys done with male students in the 1970s indicated uncertain career goals, interest in professional education, intellectual stimulation, and subject matter interest.[196] Daicoff concluded that at that time, entering students' personalities were dominant, competitive, leadership-oriented, socially confident, relatively secure, inclined to thinking rather than "feeling, and motivated by achievement."[197] She also cited several studies identifying increased stress and anxiety among law students, and others that found that law students' attitudes toward the legal profession tended to became more negative from the time of entry to the time of graduation.[198]

A subsequent review of empirical research on legal education more generally probed related studies and emphasized their limitations.[199] This compilation provides more extensive documentation regarding studies of such issues as gender bias, study habits, impact of class rank on hiring, and other topics. The authors observed, however, that "[f]ew, if any, studies have investigated factors which affect students' perspectives of the law school experience"[200] and concluded that "strong and bold answers" to questions about changes in "attitudes, values and personalities as a function of law school" are not justified, given the poor methodology in the area.[201]

More recently, a number of studies have focused on the law school experiences of women, people of color, and gay and lesbian students.[202] Many of these studies have focused on student

---

195. *See* Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337 (1997) [hereinafter *Daicoff, A Review*]; *see also* SUSAN DAICOFF, LAWYER, KNOW THYSELF (2004).

196. *Daicoff, A Review, supra* note 195, at 1356-59.

197. *Id.* at 1372-73.

198. *See id.* at 1378-88.

199. James R.P. Ogloff et al., *More Than "Learning to Think Like a Lawyer:" The Empirical Research on Legal Education*, 34 CREIGHTON L. REV. 73 (2000).

200. *Id.* at 108.

201. *Id.* at 99.

202. *See, e.g.*, Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515 (2007) (discussing the culture of many elite law schools that encourage competition and conformity and therefore results in disaffection from personal identity); Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994) (discussing the experience of women in elite law schools); Timothy Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 L. & SOC. INQUIRY 711 (2004) (citing range of literature across disciplines, and analyzing performance of non-traditional law students with reference

experiences in specific law schools and lack the breadth of empirical work that would track student interests more broadly. Other studies have focused on issues of stress and psychological distress.[203] Additional work has been done on law students' learning styles and psychological characteristics.[204]

Perhaps the most trenchant study considering the views of law students beyond the first year is that conducted by Mitu Gulati, Richard Sander, and Robert Sockloskie in the spring of 1998 and 1999, using surveys completed by graduating third year students at eleven law schools in the final weeks of spring semester, and comparing results with a 1995 survey of 1Ls with more wide-spread participation. [205] The authors noted that the sample used in the 3L study was limited due to attendance rates of approximately 50 percent overall, with those attending classes (and responding) having grade point averages situating them at the 60th percentile among

to data from LSAC 1991 Bar Passage Study); Elizabeth Mertz et al., *What Difference Does Difference Make*, 48 J. LEGAL ED. 1 (1998) (discussing impact related to race and gender in law school classrooms); Janice L. Austin et al., *Results From A Survey: Gay, Lesbian, and Bisexual Students' Attitudes About Law School*, 48 J. LEGAL EDUC. 157 (1998) (discussing survey results reflecting experiences of gay, lesbian, and bisexual students).

203. *See, e.g.,* Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well Being*, 22 BEHAV. SCI. L. 261 (2004) (comparing Florida State law students with University of Missouri undergraduates); S. C. Segerstrom, *Perceptions of Stress and Control in the First Semester of Law School*, 32 WILLAMETTE L. Rev. 593, 600-02 (1996); Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 144 (2002); Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 77 (2002) (discussing adverse effects of law student stress); Ruth Ann McKinney, *Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution?*, 8 LEGAL WRITING 229 (2002) (discussing student depression and anxiety and implications of teaching techniques). For an alternative formulation, using a large set of empirical data to assess law student life satisfaction, see Nisha C. Gottfredson et al., *Identifying Predictors of Law Student Life Satisfaction*, 58 J. LEGAL EDUC. 520 (2008) (concluding that smaller, more diverse law schools with higher quality teaching and classroom instruction facilitate law student life satisfaction).

204. Regarding psychological characteristics, see, e.g., MARTHA M. PETERS & DON PETERS, JURIS TYPES: LEARNING LAW THROUGH SELF-UNDERSTANDING (2007). Regarding learning styles, see, e.g., Robin Boyle et al., *Law Students Are Different From the General Population: Empirical Findings Regarding Learning Styles*, 17 PERSP. TEACHING LEGAL RES. & WRITING 153 (2009) (comparative study of students at different law schools using Dunn & Dunn learning style model); Eric A. DeGroff & Kathleen McKee, *Learning Like Lawyers: Addressing the Differences in Law Student Learning Styles*, 2006 B.Y.U. EDUC. & L.J. 499 (2006) (discussing range of learning style issues); M.H. Sam Jacobson, *A Primer on Learning Styles: Reaching Every Student*, 25 SEATTLE U. L. REV. 139 (2001) (discussing range of learning style issues).

205. Mitu Gulati et al., *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235 (2001).

their classmates.[206]

The study indicated that third year students reported studying much less per week than first year students (nearly two-thirds of 3Ls reported studying less than twenty hours per week as compared to approximately 11 percent of 1Ls). Most third year students reported completing much less reading than their first year counterparts (22.5 percent of 3Ls said they completed most of their reading, in comparison to 68.8 percent of 1Ls). Nonetheless, more than 85 percent of 3Ls reported that they were fairly satisfied or very satisfied with law school. More than 55 percent of 3Ls said that their faculty treated them with respect, and 79 percent said they anticipated having a satisfying or very satisfying career. Third year students reported that in making career choices, they looked for a good place to acquire legal skills (51 percent), earn money and pay off debts (46 percent) and be treated fairly (40 percent). They believed it very important to be judged by the quality of their work (79 percent) in their employment. In comparison to 1Ls, 3Ls were substantially less depressed (42.5 percent of 1Ls said they were rarely or never depressed, in contrast with 64.1 percent of 3Ls), while nearly all 1Ls and 3Ls reported finding law school stressful to some degree (19 percent of 1Ls and 22 percent of 3Ls said law school was not at all or not especially stressful). Factors that led to stress for 3Ls included too much work (45 percent), competition for grades (52 percent), worries about jobs (61 percent), general law school environment (41 percent), balancing school with outside life (61 percent), and financial concerns (51 percent).

Using factor analysis, the authors determined that a number of key factors clustered together in describing students who were alienated from law school (feeling pessimistic about having a satisfying career, feeling dissatisfied with law school, finding law school unnecessarily competitive, believing that faculty do not treat students with respect, believing that there was substantial hostility within law school along racial and political lines, and experiencing "derisive comments" from fellow students). Women, blacks, and Asians were particularly alienated, using this methodology, and those who were alienated felt in particular that the third year of law school was superfluous (55 percent versus 42 percent of those not alienated) and was "too theoretical" (63 percent versus 40 percent).

The authors also analyzed the factors that influenced students to attend law school. They found that "developing a satisfying career" was especially important (cited by 65.2 percent of 1Ls and 75.7 percent of 3Ls), followed by intellectual challenge (44.1 percent of 1Ls and 54.3 percent of 3Ls), achieving financial security (40.1 percent of

---

206. *Id.* at 243.

1Ls and 49.4 percent of 3Ls), desire to help individuals (38.1 percent of 1Ls and 45.3 percent of 3Ls), and desiring to change or improve society (32.4 percent of 1Ls and 28.7 percent of 3Ls).

The authors indicated that they wished they had asked more questions about "why so many students attach little value to the third year of law school." They analyzed whether participation in clinical courses significantly affected the evidence of student disengagement, but found relatively little difference between students enrolled in such courses and those who were not.[207]

The authors' ultimate conclusions concerned which of three possible narratives were most well-grounded in describing third year students' experience: the "official story" (all is well), the "bleak story" (third year is irrelevant and third year law students are alienated), and the "signal story" (law students are sorted after the first year and can relax thereafter since their fates are sealed). They determined that the "signal story" hit closest to the mark. They concluded that the patterns observed

> suggest that third-year law students have a hunger for applying what they have learned in law school to client problem-solving . . . [and] with their critique of law school as too theoretical and disconnected from the real-world practice of law. In other words, it does not seem to us that students are simply being negative about their schooling, or that they are simply impatient to graduate so they can start maximizing financial gain. They seem to have a definite agenda that links career goals to serving clients and working on real-world problems, and they dismiss the third year of law school because it does not seem very relevant to that agenda.[208]

At the same time, in their view, it was important to recognize "a small portion of the student body is not merely dissatisfied with their legal education, but actually feels significantly alienated from it."[209] Moreover, many of the satisfied students in the law school mainstream appear to be willing and eager to do more in their second and third years (especially the third), "if provided with the opportunity to pursue real interests and develop new, client-oriented skills . . . [for example through] "more (and better) clinical offerings and business skills training . . . [and] opportunities to do pro bono work."[210]

Based on their analysis of the survey data, the authors outlined

---

207. Students in clinical programs were slightly less inclined to view the 3L year as superfluous (41 percent versus 45 percent of those not taking clinical programs), but were slightly more inclined to view law school as excessively theoretical (46 percent versus 41 percent). *Id.* at 247.

208. *Id.* at 259.

209. *Id.*

210. *Id.*

several alternative courses of action.[211] One is to "do nothing" (a particularly likely result, given the extent to which the "signal story" seems to reflect institutional and personal interests by "sorting" top students in the first year to the benefit of law schools and employers, while allowing students not at the top of the class to ride out the course of law school in a relatively relaxed way). A second option would be to abolish the third year as unnecessary, a path that the authors thought should at least be debated in order to provide momentum for more useful reforms. In their third and fourth options, the authors suggested a re-examination of clinical offerings (to add depth, range, and more meaningful evaluation) and to expand externships to function more like full-time "co-operative" out-placements. In their fifth option, the authors suggested reshaping law school to resemble the medical school model, by in effect turning the third year into a period in which students functioned in resource-intensive, supervised community practice settings with intensive supplemental teaching (in some ways similar to the Washington & Lee model described above). The authors' sixth alternative was to change the methodology and content of the third year by focusing on matters such as institutional structures, power and influence, perhaps using business-school type cases, while their seventh suggested giving focused attention to alienated students by creating special public-interest oriented programs that would engage them more deeply.[212]

The thrust of most of the proposals offered relates primarily to curricular content, and clinical pedagogies, ideas that have already been sketched above. What is missing is any grounded basis for concluding that these strategies are sufficient to engage students. Indeed, the reported data finding little difference between disengagement among students enrolled in clinical programs and those not enrolled suggests that there remains a missing piece. Moreover, one of the authors, then a faculty member at UCLA, noted the extensive clinical offerings available there and the overall data suggested that responding students generally had wide access to clinical opportunities but remained quite disengaged. As a result, it seems important to dig deeper, and look beyond the legal literature in hopes of understanding how second and third year students might be galvanized more meaningfully in learning beyond the first year.

<div align="center">

ii.   Insights from Elsewhere: New Challenges?
New Opportunities?

</div>

In the absence of substantial empirical evidence about law

---

211. *Id.* at 260-65.
212. *Id.*

students, it is useful to consider what has been learned about the learning priorities and interests of undergraduates, graduate students, and adults.

Undergraduates: A New Generation? Law faculty members have likely observed that present-day law students "aren't like they used to be."[213] While demographic changes are probably evident, more subtle differences relating to how law students learn and are motivated may be less apparent absent some more in-depth review of the research literature. Increasing attention has been given to these issues by those who work with undergraduate students, but legal educators are only beginning to appreciate the significance of related issues.[214]

Happily, there is a growing volume of such literature, often written by colleagues involved in undergraduate education.[215] Increasingly, educational researchers and student affairs professionals who work with undergraduate students have recognized that those who populate campuses are no longer members of the "baby boom" generation, or even of "generation X," but are instead a new generation of "Millennials" who came of age as the century turned.[216]

The underlying notion of "generations" with differing

---

213. *See, e.g.,* Beloit College, College Mindset List, http://www.beloit.edu/mindset/2013.php (last visited Aug. 21, 2009) (updated yearly for entering undergraduates).

214. *See, e.g.,* Leslie Larkin Cooney, *Giving Millennials a Leg-Up: How to Avoid the "If I Knew Then What I Know Now" Syndrome,* 96 KY. L.J. 505 (2008) (discussion of how Millennial traits may need to be addressed in clinical teaching); Susan K. McLellan, *Externships for Millennial Generation Law Students: Bridging the Generation Gap,* 15 CLINICAL L. REV. 255 (2009) (discussing need for structure, praise, collaborative assignments, discussion of personal stories, discussion of office culture, attention to stress, attention to workloads, discussion of multi-tasking); Tracy L. McGaugh, *Generation X in Law School: The Dying of the Light or the Dawn of a New Day?,* 9 LEGAL WRITING 119 (2003) (discussing differences between Gen Xers and Millenial students); Joan Catherine Bohl, *Generations X and Y in Law School: Practical Strategies for Teaching the "MTV/Google" Generation,* 54 LOY. L. REV. 775 (2008) (comparing generational differences in learning styles, including the role of technology and the implications of the educational system on Millenial students).

215. *See, e.g.,* Kristine Johnson, *The Millennial Teacher: Metaphors for a New Generation,* 6 PEDAGOGY 1, 7 (2006) (discussing pedagogy and Millennial students); Michael D. Coomes & Robert DeBard, *A Generational Approach to Understanding Students* 2004 NEW DIRECTIONS FOR STUDENT SERV'S NO. 106, 5 (2004); Maureen E. Wilson, *"Teaching, Learning, and Millennial Students",* 2004 NEW DIRECTIONS FOR STUDENT SERV'S NO. 106, 59 (2004); C. Carney Strange, *Constructions of Student Development Across the Generations,* 2004 NEW DIRECTIONS FOR STUDENT SERV'S NO. 106, 47 (2004) (discussing general educational issues raised by Millennial students in colleges).

216. NEIL HOWE & WILLIAM STRAUSS, MILLENNIALS RISING: THE NEXT GREAT GENERATION (2000). Millennials are also called Gen Y and Gen Next.

expectations and experiences was popularized most recently by William Strauss and Neil Howe.[217] Based on a review of historical cycles, Strauss and Howe posited that those who live during particular time periods typically share common experiences at certain times of their lives. As a result, in their view, "generations" often share particular assumptions, values, behaviors, and challenges. They argued that any given "generation" (defined by reference to the period when a population group was born) precesses through four major life stages (each running about twenty to twenty-five years in duration). In their view, overlapping generations do not experience life events in the same way and do not have a linear pattern of development. Instead, they theorize that society itself goes through a four-part cycle in roughly eighty year intervals, moving from a "high" point, through an "unraveling," to a "crisis" and ultimately an "awakening," before repeating that cycle.

Accordingly, those born in different parts of this extended cycle face a different sequence of social demands depending on when in the historical cycle they are born. In Strauss and Howe's view, there are four generational prototypes: (a) prophets/idealists (born during a "high," spending early adulthood during an "awakening," experiencing an "unraveling" during mid-life, then "crisis" in older age); (b) "nomads" (born during an "awakening," with early adulthood spent in an "unraveling," entering midlife during a "crisis," and experiencing old age during a "high"); (c) heroes/civic-minded (born during an "unraveling," with early adulthood during a crisis, midlife during a "high," and old age during an "awakening"); and finally (d) artists/adaptives (born during "crisis," with early adulthood during a "high," midlife during an "awakening," and older age during an "unraveling"). Under this rubric, the most recent generations include the "greatest/GI generation" (an example of "heroes," born from 1901-1924); the "silent generation" (artists/adaptives, born from 1925-1942); the "baby boom" generation (prophets/idealists, born from 1942-1960); "Gen X" (nomads, born from 1961-1981); and Millennials or Gen Y (civic-minded heroes, born from 1982-2000).

Against this backdrop, the "Millennial generation" of college (and law) students share common characteristics derived from their life experiences to date.[218] They see themselves as "special" and "important" (having been treasured by their parents and expecting positive feedback at every turn). They are "sheltered" (having been protected and advocated for by their parents). They are "confident"

---

217. NEIL HOWE & WILLIAM STRAUSS, GENERATIONS (1991).

218. For a discussion of the listed characteristics of Millennial Generation undergraduates, see Robert DeBard, *Millennials Coming to College*, 2004 NEW DIRECTIONS STUDENT FOR SERV'S No. 106, 33 (2004).

and highly motivated (expecting others to assist them in their path by providing immediate feedback or other help on demand). They are "team" or "group"-oriented (expecting to be part of a tight-knit group, not wanting to stand out, but willing to give service as part of their cohort particularly if such efforts redound to their own benefit). They focus on "achievement" including good grades, extracurricular success and high-paying jobs, particularly in the sciences, but often believe that they are entitled to such recognition and expect to be given explicit instructions on how to achieve at the highest levels. They may feel "pressured" as a result since they have been highly scheduled, prefer to avoid risks, expect others to accommodate them (rather than vice-versa), and tend to multi-task. They also tend to be "conventional," civic-minded, and disinclined to question authority (often valuing their parents' values, expectations, and rules, rather than striking out for themselves).

Faculty members should make their own judgments whether the "generational" approach of Strauss and Howe reflects pop culture or something more.[219] It appears evident, however, that those in many other fields are taking these descriptions seriously as a way of planning for the future.[220] Law faculty members may also find it fruitful to recognize that current faculties are themselves divided between a small number of remaining members of the "Silent Generation" (now nearing retirement age at 65 and above), a more substantial number of aging "Baby Boomers" (aged 49-65), and a growing number of "Gen X-ers (age 28-48). These groups often see the world in very different ways if the work of Strauss and Howe is to be believed. Baby Boomers have given work a high priority, tend to distrust authority, have been open to change, and were shaped by the Civil Rights era. Gen X-ers are sometimes described as "latchkey" kids who distrust institutions, focus on carrying their careers on their backs from place to place, demand work-life balance, value entrepreneurial opportunities and expect frequent feedback. Each of

---

219. *See* Jennifer R. Keup, *New Challenges in Working with Traditional-Aged College Students*, 144 NEW DIRECTIONS FOR HIGHER EDUC. 27, 28 (2008) (arguing that the "generational approach" reflects other issues, such as a "truly multicultural student body," "burgeoning mental and emotional health care needs," students' vocational view of higher education, and "the integration of new technologies").

220. For example, the business community has taken the anticipated generational shift very seriously. *See, e.g.*, Sylvia Ann Hewlett, Laura Sherbin & Karen Sumberg, *How Gen Y & Boomers Will Reshape Your Agenda*, HARV. BUS. REV., 71-76 (2009) (focusing on differences between baby boomers and Gen Y and their demands in the workplace); LYNNE C. LANCASTER & DAVID STILLMAN, WHEN GENERATIONS COLLIDE: WHO THEY ARE. WHY THEY CLASH. HOW TO SOLVE THE GENERATIONAL PUZZLE AT WORK (2002) (discussing management issues in the workplace); BRUCE TULGAN, NOT EVERYONE GETS A TROPHY: HOW TO MANAGE GENERATION Y (2009) (discussing management issues).

these generations must take into account differences with the other when collective decision-making occurs within the academic context. They are also likely to experience differing conflicts in how they and their students see the world.[221]

Nonetheless, "Baby Boomers" and "Gen X" faculty members face some common challenges in educating Millennial generation students. Such students have high self-regard and expect to do well. They expect detailed guidance and ready feedback. They are closely affiliated with their parents and have often not yet embarked on the expected pathway to adulthood in which they would separate from their parents. Their close links to their friends and conventional attitudes often create challenges in defining their own values and pathways into the future. If this analysis is to be believed, historical problems with student alienation and disengagement during the final stages of law school are only likely to grow more intense.

Other factors may well exacerbate these student frustrations. For example, as young people spend ever less time reading,[222] faculty members who rely primarily on assigning casebook reading and analysis are likely to find that students are disengaged as a result. Since reading is fundamental to the legal profession, more attention may be needed on developing this skill and inclination, yet students may be disinclined to value such undertakings.[223] Millennial generation students are also "digital natives"[224] marked by an early

---

221. For a useful chart comparing generational values among boomers, Gen Xers and Millenials, see DeBard, *supra* note 215, at 4. (comparing views as to levels of trust, institutional loyalty, career goals, rewards, views toward family and children, education, evaluation, political orientation and "the big question"; and finding that as to levels of trust, Boomers are confident in themselves but not authority, Gen Xers have a low level of trust of authority and Millennials have a high level of trust toward authority; in family life, Boomers were indulged, Gen Xers were alienated and Millennials were protected; as to evaluation, Boomers expect evaluation once a year with documentation, Gen Xers may ask for evaluation informally, and Millennials desire feedback whenever they choose to request it; and as to loyalty to institutions, Boomers are cynical, Gen Xers believe it naïve to be loyal to institutions, and Millennials are institutionally committed).

222. For a discussion of the national decline in reading, see Sunil Iyengar, *To Read or Not to Read*, 2007 NAT'L ENDOWMENT FOR THE ARTS 1, 7 (2007), http://www.nea.gov/research/ToRead.PDF (reporting that nearly half of all Americans aged 18 to 24 read no books for pleasure, a drop of 7 percent from 1992 to 2002, and that less than one-third of 13-year-olds read on a daily basis).

223. For evidence that law students read less outside of class, see discussion of LSSSE data, *supra* note 122 and accompanying text. For discussion of decline in reading among undergraduates, see NSSE data, *supra* note 119, at 133.

224. *See* DON TAPSCOTT, GROWING UP DIGITAL: THE RISE OF THE NET GENERATION (1998); Mark Prensky, *Digital Natives, Digital Immigrants*, 5 ON THE HORIZON 1 (2001); Digital Natives, *Digital Immigrants, Part 2: Do They Really Think Differently?*, 9 ON THE HORIZON 1 (2001).

and continuing connection with ubiquitous technology.[225] In these respects they may also differ significantly from some of their professors. Given the backdrop of Millennial student expectations, it will be important to make common cause with other legal educational professionals who have developed in-depth insights about this generation of students and to build strategies that play to their particular points of view.

Given such students' limited prior experience in shaping their own expectations, educational and professional paths apart from others' expectations, there is an ever greater need to attend to their personal, educational and professional development. It will be important to guide them through the process of maturation and build their capacity to define their own goals and values given the extent to which they have been shaped by their parents and conventional norms in the past. In addition, it will be crucial to provide them with personalized guidance and feedback since that is part of their expectation of the world within which they exist. Because they have come of age in a time of relative privilege, conventional success, and security, it is likely to be particularly disconcerting to navigate law school and the entry into professional roles at a time of considerable flux. In light of these considerations, additional attention should be given to how graduate and professional students develop a sense of personal and professional identity at this crucial time in their developmental trajectories and how they can be guided to take responsibility for their futures beyond law schools doors.

Lessons from Graduate Students. Another source of useful insights arises from intensive work on graduate students and the development of "future faculty" over the past decade. Graduate students are typically comparable in age to law students and reflect generational viewpoints. Historically, faculty involved in preparing doctoral students have not necessarily seen themselves as involved in the task of "professional education," so their fresh approaches to key questions relating to graduate education and student development

---

225. DIANA OBLINGER & JAMES OBLINGER, EDUCATING THE NET GENERATION (2005), http://www.educause.edu/educatingthenetgen (discussing issues facing students, faculty and others in preparing the generation who grew up with the Internet); GAIL SALAWAY, JUDITH BORRESON CARUSO, MARK R. NELSON, THE ECAR STUDY OF UNDERGRADUATE STUDENTS AND INFORMATION TECHNOLOGY (2008), http://net.educause.edu/ir/library/pdf/ERS0808/RS/ERS0808w.pdf (last visited Sept. 14, 2009) (discussing experiences reported by undergraduates, time spent on-line, importance of social networking, information/internet literacy, expectations regarding use of information technology in courses, and the importance of information technology in fostering convenience of access); DAVID THOMSON, LAW SCHOOL 2.0: LEGAL EDUCATION FOR A DIGITAL AGE (2009), http://www.lawschool2.com/ (last visited Sept. 15, 2009) (discussing implications of technology change, generational shifts and other forces likely to influence the future of legal education).

may provide new insights that longtime faculty members who see themselves as engaged in professional education might not otherwise explore.

The increased attention that has been given to preparation of future college faculty members has arisen in part because of the anticipated retirement of a significant cohort of university professors (at least before the current economic downturn). Because of the cross-cutting nature of these inquiries, there has been a tendency to pass over the "content knowledge" dimension of student preparation and to address other unifying considerations that link graduate and professional students more generally.

An important theme in this work is how such students develop a sense of "professional identity." For many, "professional identity" is not a phrase with a well-defined meaning. "Identity" has been described by educational researchers as "what it means to be who one is," taking into account that most individuals have "multiple" identities associated with distinctive social roles (for example related to their background, demographic characteristics, or social roles).[226] Where multiple identities exist, an individual may need to struggle to determine which is most salient (given his or her commitment to the competing identities).[227] Development of a "professional identity" requires an internalization of socially-expected roles after reconciling any disjunctions with the sense of "personal" identity. Once a "professional identity" has been internalized, it provides a cognitive framework for interpreting new experiences.[228] Educational researchers who study the development of "professional identity" often regard that process as one involving "socialization.[229]

While there is general agreement within this literature that socialization toward a "professional identity" is a "developmental

---

226. Carol L. Colbeck, *Professional Identity Development Theory and Doctoral Education*, 2008 NEW DIRECTIONS FOR TEACHING AND LEARNING NO. 113, 9-10 (2008).

227. *Id.* at 10-13.

228. *Id.* at 10.

229. *See* Ann Austin & Melissa McDaniels, *Preparing the Professoriate of the Future: Graduate Student Socialization for Faculty Roles*, 21 J. HIGHER EDUC. 397 (2006); JOHN C. WEIDMAN ET AL., SOCIALIZATION OF GRADUATE AND PROFESSIONAL STUDENTS IN HIGHER EDUCATION—A PERILOUS PASSAGE? 28 ASHE-ERIC HIGHER EDUC. REPORT NO. 2 (2001) [hereinafter ASHE MONOGRAPH 2001]. Austin and McDaniels reference prior work defining socialization as "the processes through which [a person] develops [a sense of] professional self, with its characteristic values, attitudes, knowledge, and skills . . . which govern [his or her] behavior in a wide variety of professional (and extraprofessional) situation" and as the process by which individuals come to be able to answer key questions such as a person should be able to answer such questions as: "(1) What do I do with the skills I have learned? (2) What am I supposed to look like and act like in my professional field? and (3) What do I, as a professional, look like to other professionals as I perform my new roles?" Austin & McDaniels, *supra* at 400.

process," the dimensions of that developmental process are complex.230 There are several "stages" in which "professional identity" is established: the "anticipatory stage" (when students enter into training), the "formal stage" (when students enter the program and establish goals); the "informal stage" (when students develop and engage in a peer culture); and the "personal stage" (when they internalize the sense of professional roles and develop an integrated self-concept).231

Perhaps more importantly, several elements of socialization have been identified: "knowledge acquisition"; "investment" (involving time, money, sponsorship); and "involvement" (characterized by role-taking and engagement with faculty and older students).232 Finally, effective socialization depends on "structural engagement" that reflects a "cognitive commitment" (identification with problems, tasks and knowledge associated with professional roles), "cohesion commitment" (tied to a novice's relationship with peers and faculty members and the novice's resulting sense of obligation to live up to expectations), and "control commitment" (development of a sense of moral obligation to live up to the profession's expectations of roles and responsibilities at a very personal level).233

Interestingly, too, there are parallels between findings in research studies of doctoral students and those relating to law students described earlier. For example, it appears that doctoral students who "buy into" the goals and priorities of their doctoral programs (for example, the priority put on research over teaching) tend to link up more closely with faculty sponsors and experience a better "fit" and readier integration into professional roles than those who have broader networks of peers and family with whom to engage and who are still assessing the "fit" between their interests and the education that they are being provided.234

---

230. *See* SUSAN GARDNER, THE DEVELOPMENT OF DOCTORAL STUDENTS: PHASES OF CHALLENGE AND SUPPORT, 34 ASHE HIGHER EDUCATION REPORT NO. 6, 8 (2009). This monograph draws on qualitative studies of 177 doctoral students around the country and posits a three-phase process of identity development: phase I, entry (admission, coursework, learning balance, transitioning from undergraduate to graduate school expectations), including challenges of changes in thinking and transitions from prior education; phase II, integration (course work, examination, changing relationships with peers and faculty, including challenges involving cognitive development, examinations, disillusionment, and role); and phase III , candidacy (candidacy for Ph.D., dissertation work, job search, transition to professional role, including challenges of isolation, and transition to professional role). *Id.* at 40-88.

231. Austin & McDaniels, *supra* note 229, at 401-03.

232. *Id.* at 404.

233. ASHE Monograph 2001, *supra* note 229, at 19-20.

234. *See* Vicki Baker Schweitzer, *Towards a Theory of Doctoral Student Professional Identity Development: A Developmental Networks Approach*, 80 J. HIGHER EDUC. 1

By putting aside analysis of content knowledge and how doctoral students develop it, these research streams isolate some of the key issues facing legal educators. "Socialization" has increasingly been explicitly regarded as an important process that should be taken seriously and is the responsibility of the doctoral program, not the department that a newly-minted Ph.D will join later. Socialization involves the process of learning culture, values, attitudes and expectations, and is made more difficult because there are multiple dimensions of socialization happening simultaneously (to the role of student, to the academic life, to the academic profession, and to the disciplinary field).[235] Graduate students must grapple with multiple tasks: intellectual mastery (perhaps asking "can I do this?"), desire (wondering "do I want to do this both as a graduate student and as a future faculty member?"), and orientation to the field (considering "do I belong here?")[236]

Graduate students have critiqued their programs in much the same ways that law students have. They have been concerned that the programs lack developmentally organized, systematic approaches to building a sense of their identity within the profession, and sufficient feedback, mentoring, and opportunities for guided reflection.[237] In addition, there are significant motivational issues, related to conceptions of professional roles for those seeking meaningful work, when roles and options are not clear.[238] Graduate

(2009) (using a small sample of graduate student interviews to develop hypothesis about the importance of "fit" between their personal goals and expectations, their interaction with various networks, and the goals and expectations of the academic department in which they undertake graduate school, and finding more substantial gaps in fit for those who do not readily embrace the emphasis on academic research common in graduate programs at research universities).

235. Austin & McDaniels, *supra* note 229, at 401-03.

236. *See* Chris M. Golde, *Beginning Graduate School: Explaining First Year Doctoral Attrition*, 1998 NEW DIRECTIONS FOR HIGHER EDUC. 55, 56-57 (1998). Others characterize the core elements of socialization as knowledge acquisition, investment and involvement. *See, e.g.*, ASHE Monograph 2001, *supra* note 229, at 15-19. For a diagrammatic portrayal of the complexity of graduate student socialization, see *id.* at 37 (depicting at the heart the focus on knowledge acquisition, investment, and involvement; the university's role in creating an institutional culture, including academic program and peer culture; the university's role in socialization, including interaction, integration and learning; and the interplay with prospective students (backgrounds and predispositions), personal communities (families, friends and employers); professional communities (practitioners and associations), and novice professional practitioners (demonstrating commitment and identity).

237. Ann E. Austin, *Preparing the Next Generation of Faculty*, 73 J. OF HIGHER EDUC. 94, 103-10 (2002).

238. *Id.* at 109 ("Faculty members seem to assume that graduate students either arrive with an understanding of faculty work or develop such understanding implicitly .... A doctoral student studying music illustrated the uncertainty expressed by a number of participants [in the study] .... 'I have no idea what it's like to be a faculty

students therefore seek more mentoring, advising and feedback; more structured opportunities to meet and talk with peers and to explore diverse potential future responsibilities; and opportunities for regular guided reflection.[239] Many law students would likely ask for the same.

Adult Development and Learning. A final area from which important insights can be gleaned is research relating to adult development and learning. While, as discussed above, prior thinking about college student learning and development has often been guided by analysis of psychological insights into adolescence, increasingly such insights seem relatively naïve. More sustained attention has been given to a time in life referred to as "emerging adulthood" typically experienced by those between eighteen and twenty-nine years of age.[240] Over the last fifty years, those in this age range have gradually come to experience a separate phase of life unlike that marking the lives of young people before World War II who often had no access to college opportunities and whose lives accordingly progressed in different ways.

Three principles are of particular significance, as derived from the research literature relating to adult development, adult learning, and the development of expertise. First, there is a very close linkage between individual development and learning, and the dynamics of that interrelationship is specific to life-state.[241] Learning results in

---

member. And I thought being a graduate student might give me some idea, and it doesn't . . . . I don't know anything. I feel like I should, but I don't.'").

239. *Id.* at 110-12.

240. The notion of "emerging adulthood" has been credited to J. J. Arnett. *See* J. J. Arnett, *Emerging Adulthood: A Theory of Development From the Late Teens Through the Twenties,* 55 AM. PSYCHOLOGY 469 (2000); J. J. Arnett, *Conceptions of the Transition to Adulthood: Perspectives From Adolescence Through Midlife,* 8 J. OF ADULT DEV. 133 (2001). For an updated discussion, see, e.g., Jennifer L. Tanner, Jeffrey Jensen Arnett & Julie A. Leis, *Emerging Adulthood, in* HANDBOOK OF RESEARCH ON ADULT LEARNING AND DEVELOPMENT 36, 36-37 (M. Cecil Smith & Nancy deFrates-Densch eds., 2009) (discussing later work by Arnett that described this stage as (a) the age of identity explorations; (b) the age of instability; (c) the self-focused age; (d) the age of feeling in-between, and (e) the age of possibilities).

241. *See* Sharan B. Merriam & M. Carolyn Clark, *Learning and Development: The Connection in Adulthood, in* HANDBOOK OF ADULT DEVELOPMENT AND LEARNING 29 (Carol Hoare ed., 2006). Limited research has been done on the issue of "emerging adulthood" outside the United States or among minority cultures in this country. *See, e.g.,* Tanner, *supra* note 240, at 54-56. The authors conclude that the "phenomenon [of emerging adulthood] does indeed exist in various forms" outside the United States but that there are some notable distinctions between criteria associated with adulthood (for example, only 50 percent of the "American majority" believe that adulthood requiring learning "always to have good control of your emotions" compared to approximately 68 percent of Asian-Americans, 77 percent of Latinos, 69 percent of African Americans, and 80 percent of Mormans). *Id.* at 55. They conclude that there is research showing that "[i]n contrast to Caucasian Americans, emerging adults in

change and thus fuels students' personal and professional "development." [242] Second, individuals face inherent developmental challenges based on their stage in life, and seek out learning to help themselves negotiate these challenges.[243] Finally, "identity" (both personal and professional) plays a crucial role in fueling both learning and personal development at this stage in life.[244] Each of these considerations has an important bearing on the experience of law students and how they might be galvanized to engage more significantly in the latter part of their legal educations.

During the stage of "emerging adulthood," learning and development become the responsibility of the individual (who has moved beyond the socially-mandated role of "student" and is expected to develop more substantial self-directedness).[245] The period of "emerging adulthood" is one marked by "identity explorations," instability, self-focus, feeling "in-between," and experiencing "possibilities."[246] This period is increasingly viewed as a "process" involving the development of individual pathways from adolescence

---

ethnic minority groups are more likely to favor criteria for adulthood that reflect obligations to others." *Id.* at 56.

242. Merriam & Clark, *supra* note 241, at 29-31 ("development" involves change over time; education triggers change; learning is embedded in life experiences). *See also* ROBERT KEGAN, IN OVER OUR HEADS: THE MENTAL DEMANDS OF MODERN LIFE (1994) (arguing that there are several "orders of mind" that arise over the life span, that the de facto "curriculum" of day-to-day modern life continues to evolve and to place increasing demands on individuals to develop more complex mental processes as a result); Gardner, *supra* note 230 (providing a "primer" on student development theory, and tracking development of psychosocial development, social identity development, and cognitive structural development).

243. *See* Tanner, *supra* note 240, at 34 (noting that prior to "emerging adulthood" education is socially mandated, but thereafter is undertaken by choice); *id.* at 40-43 (discussing challenges of emerging adulthood relating to acquisition of cognitive skills needed for practical problem-solving in the adult world, career choice, exploration and development of identity).

244. *Id.* at 36 (Erikson and other theorists working in the 1940s associated identity exploration with adolescence, but Arnett and other recent theorists emphasize that identity exploration takes place in emerging adulthood, including exploration as to love and life partnerships and movement from part-time employment to finding jobs that fit well with individuals' interests and abilities).

245. *Id.* at 38-40 (describing "recentering" in which most individuals move beyond the adolescent period when they are typically emotionally and legally dependent upon their family of origin and explore identity issues internally and subjectively, toward emerging adulthood when they are more active in trying on adult roles and identities and while gaining greater independence).

246. *Id.* at 36-38 (instability arises because of experimentation with identity and personal relationships; "self-focus" is associated with the relative lack of structure and freedom from constraining obligations to others during this period; the feeling of being "in between" reflects the unevenness of development and subjective sense of being in transition; and the association with "possibilities" arises from the sense of hope and freedom to move on from prior ties to family).

to adulthood, rather than simply a string of social transitions.[247] The period is often marked by a three-stage process, involving "re-centering" (legal emancipation from parents and shift from dependent adolescence to independent adulthood), exploration of new roles to determine fit (often on a temporary basis to determine which "fit"), and making enduring commitments to relationships and careers (which serve to sustain adult self-sufficiency).[248]

During this period, there are changes in the brain that reflect full development of reasoning and problem-solving abilities and integration of cognition and emotion.[249] Theorists have suggested that there are two stages of cognitive development at this time, one involving "achieving" (acquisition of knowledge to establish oneself in the world) and the other involving "responsibility" (requiring practical problem-solving abilities, ability to monitor one's own behavior, and to address needs within the boarder social context).[250] The period is one in which individuals develop expertise and judgment and move through different forms of "intelligence" (from the type that may be genetically pre-disposed to that which is culture-relevant, culture-dependent, and more linked to pragmatics).[251]   It is a key time for acquiring "competence," experimenting with careers and relationships.[252] It is a time when achieving a sense of identity is crucial, one in which individuals endeavor to "try out and choose" relevant identities and in which

---

247. *Id.* at 38 (period is "a process rather than an event or string of social transitions").

248. *Id.* at 38-40.

249. *Id.* at 41 (citing research in the neurosciences that have demonstrated differences between adolescent and emerging adult brains; noting that the "brain's center for reasoning and problem-solving fully develops during the period of emerging adulthood, accompanied by growth in white matter and pruning of gray matter; explaining that throughout the 20s, "brain processes associated with emotion-regulation and decision making continue to develop" physiologically).

250. *Id.* (citing research by Schaie that suggests that while childhood and adolescence involve "acquisition" of intellectual skills, emerging adulthood involves application of those skills and learning to meet one's own needs and monitor one's own behavior).

251. *Id.* at 42 (comparing forms of intelligence related to "mechanics" and "pragmatics;" citing research showing that at age twenty-five "fluid intelligence" used in mechanical information processing begins to decline, while "crystallized" intelligence involving culturally relevant and dependent knowledge with pragmatic dimensions stabilizes).   The authors also suggest that specific "practical" and "emotional" intelligences are particularly salient to emerging adults and the labor markets in which they may seek jobs. *Id.* at 42-43.

252. *Id.* (citing research on the acquisition of wisdom that indicates that "attaining wisdom-related knowledge and judgment occurs primarily during emerging adulthood, from ages 15-25"); *id.* at 40 (discussing the centrality of making commitments to adult roles and selecting life goals based on available resources and opportunities).

prior experiences are integrated.[253] Significantly, programs designed to encourage learning and development during this age period have the potential to capitalize on this underlying developmental process by using methods that link identity processes with program goals.

Finally, emerging adulthood is a period in which development of professional expertise is particularly salient. "Expertise" has long been understood as a product of intelligence and effort.[254] As discussed above, significant strides in understanding the development of expertise have been made both by studying generic problem-solving (and related development of novices into experts)[255] and on the development of expertise in the context of particular domains.[256] More recently, attention has turned to how expertise develops along the full developmental span (not just the differences between novices and experts), recognizing that motivational and emotional factors (such as curiosity and intentionality) play a complementary and integrated role in expertise development.[257]

Recent research regarding the importance not only of intelligence but also of interest, personality, motivation, social interaction, instructional strategies, deliberate practice, "real world" thinking, creativity, and practical thinking in the development of real world problem-solving abilities and expertise.[258] The interplay of knowledge, interest and strategies is crucial.[259] In-depth knowledge is not enough for expertise; instead there must be an ability to generalize, work in concept, and develop processing strategies for dealing with problems.[260]

Conclusions. What insights can be gleaned for legal educators, based on this range of research and related insights? Legal

---

253. *Id.* at 43 (discussing trying out of identities and integrating information about one's internal self and external contexts).

254. *See* Patricia A. Alexander, P. Karen Murphy & Jonna M. Kulikowich, *Expertise and the Adult Learner: A Historical, Psychological, and Methodological Exploration,* in HANDBOOK OF RESEARCH ON ADULT LEARNING AND DEVELOPMENT 486-89 (M. Cecil Smith and Nancy deFrates-Densch, eds., 2009) (discussing historical perspectives of Plato, Galton, and Terman); *see also* K. ANDERS ERICSSON, NEIL CHARNESS, PAUL J. FELTOVICH & ROBERT R. F. HOFFMAN, THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE (2006); K. ANDERS ERICCSON, DEVELOPMENT OF PROFESSIONAL EXPERTISE: TOWARD MEASUREMENT OF EXPERT PERFORMANCE AND DESIGN OF OPTIMAL LEARNING ENVIRONMENTS (2009).

255. Alexander et al., *supra* note 254, at 488-91 (discussing influence of computing and information-processing studies on early approaches defining expertise as generic problem-solving such as that involved in logic puzzles).

256. *Id.* at 491-92.

257. *Id.* at 492-99.

258. *Id.* at 498-99.

259. *Id.* at 501.

260. *Id.* at 502-03.

education has not adequately researched the characteristics and developmental challenges facing law students and must accordingly look elsewhere to determine how to galvanize student interest beyond the first year. Perspectives on undergraduate students suggest that the challenges will only become more difficult as students become self-focused and overly-confident, while expecting close oversight, clear direction, and substantial success based on conventional attitudes. Law students, like their graduate student peers, will desire more intensive mentoring, socialization into professional norms, and assistance in sorting out critical issues relating to personal and professional identity. The research and theory relating to "emerging adults" suggests that attention needs to be paid to the development of students' personal and professional identities and to practical approaches to developing their expertise.

iii. Strategic Approaches

More cohesive institutional missions, attention to curricular progression, and fresh approaches to content, course design and pedagogy will undoubtedly prove helpful in responding to the wicked problem of the upper division curriculum. At the end of the day, however, these approaches alone fail to engage many individual students at the deeper level where they may best be galvanized. Additional strategies are therefore needed to tap into the deep dimensions of student development and galvanize their inherent desire and capacity to move through the developmental pathways they encounter as emerging adults.

Students are likely to face significant challenges in determining which professional pathways they wish to pursue. The evidence discussed above suggests that "emerging adults" face a process of "trying on" a range of possible identities. Past studies, for example, suggest that many entering law students anticipate embarking on public-service related careers when entering law school but gradually change gears as time goes on.[261] First year students are discouraged from working, have limited access to career service offices, and are thrust into a relatively artificial context in which they concentrate on

---

261. *See, e.g.,* Tan N. Nguyen, *An Affair to Forget: Law School's Deleterious Effect on Students' Public Interest Aspirations,* 7 CONN. PUB. INT. L.J. 251 (2008) (discussing implications of student debt and other factors in affecting law students' interest in public service employment following graduation); DANA JACK & RAND JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN & MEN LAWYERS (1989) (discussing declining interest in public interest work during law school); Aaron Haas, *The Rationality of Law Students' Career Choices,* RICHMOND J. OF LAW & PUB. INT. 54 (2006); Howard S. Erlanger et al., *Law Student Idealism and Job Choice: Some New Data on an Old Question,* 30 LAW & SOC'Y REV. 851 (1996).

mastering cognitive skills in common law courses. They accordingly tend to have only limited bases early-on for pinning down potential future career goals and paths. It is not surprising then, that they often plunge into a range of extracurricular or pro bono activities in order to "try on" potential professional roles. Law students who attend schools without co-op or clinical elements in the first year generally get their first taste of "real life" during summer jobs or internships. The range of opportunities from which to choose is often quite limited, however, and often, top students have been lured to elite corporate law firms while others take pot luck.

It is within this context that students must choose the pathways to pursue in their second and third years of school. As noted earlier, many high-achieving Millennial students have been encouraged and supported to compete at the highest levels throughout their lives, yet it is often unclear whether they have had opportunities to really know themselves and their own desires. Law schools typically offer only limited academic advising, and often students are hesitant about approaching faculty they do not know for guidance. Career services personnel do their best, but often lack information about specific courses and extracurricular groups. Understandings about career pathways are thus often skewed by (mis)information, or subtle cues passed among students. There is a significant risk that such information can make student choices in the second and third years even more difficult than they might otherwise be.

In another helpful empirical study, Professors Mitu Gulati and David Wilkins analyzed survey data from third year students attending a cross-section of law schools in spring 1998, focusing on students' perceptions about factors affecting their anticipated employment in various sectors. Students were asked to rate potential factors affecting employability in corporate settings, large/elite law firms, government/public interest/legal aid settings, small (general or specialized) practice, solo/nonlaw/academia, or other settings.[262]

Students across the full range of schools, rated law school grades (4.56), eliteness of law school (4.47), and personality (4.37) as the most important factors affecting large/elite firm employment (on a scale ranging from very important [5], to important [4], marginal [3], somewhat irrelevant [2] and irrelevant [1]). Other factors, ranked in declining order, were law review membership (3.65), relevance of courses taken (2.92), undergraduate record (2.70), physical

---

262. David B. Wilkins & G. Mitu Gulati, *What Law Students Think They Know about Elite Law Firms: Preliminary Results of a Survey of Third Year Law Students*, 69 U. CIN. L. REV. 1213 (2001).

attractiveness (2.68), and references from faculty (2.13).[263] As to government, public interest, and legal aid work, students ranked personality as most important (4.14), followed by grades (3.83), courses taken (3.74), eliteness of school (3.61), faculty references (3.18), law review membership (3.10), undergraduate record (2.45) and physical attractiveness (2.44).[264] For small firms, personality was again foremost, followed by grades, school eliteness, law review membership, then followed by physical attractiveness, undergraduate record, and faculty references as dead last.[265] The authors also analyzed students' perceptions about factors influencing career advancement and considered ways in which the type of school attended (very elite, elite, or mid-tier), race, and gender may influence students' perceptions.[266]

At root, this study indicates that third year students who have been through the process of career searches a decade ago believed that their grades, the eliteness of the school attended, their personalities, and law review membership were the principal features affecting employment. Notably, the relevance of courses taken and the nature of faculty references played a minimal role except as to government, public interest, and legal aid work (where courses taken were somewhat less than important and faculty references somewhat more than marginal in significance). It is therefore not surprising that students would conclude that much of what occurs in the second and third years is of limited significance, particularly if they also lack deeply-felt reasons for opting for one professional pathway over another.

How might this picture be changed? At least three strategic approaches might be employed that would actually address students' needs and desires to develop a well-grounded sense of professional identity, choose a meaningful career pathway, and more effectively develop professional expertise that links cognition and affect while building skills important to their future clients.

First, schools need to take student advising much more seriously. The psychological research suggests that traditional assumptions (from before World War II) that law students are already adults ready to make clear choices need to be reconsidered.[267] Instead, today's law students are understood to be "emerging adults" who are in the process of sorting out identities and preparing to make significant personal and professional choices. At the same

---

263. *Id.* at 1227.
264. *Id.* at 1226-28.
265. *Id.* at 1227, 1231.
266. *Id.* at 1234-45.
267. *See supra* text accompanying notes 240-59.

time, many such students may not yet be financially or emotionally emancipated from their parents and may be unsure about making major life choices. As a result, efforts need to be made to help them develop deeper understandings of their own strong interests, psychological proclivities, and relative strengths and weaknesses. Career services offices accordingly need to begin earlier and beef up the array of such information that can be developed by working with individual students. Ideally, all entering students should have had an opportunity to look themselves in the eye and in the heart and know what matters in their lives.

Much more also needs to be done to provide students with a range of career pathways that they can explore as they progress through law school. Linking career pathways with academic offerings and extracurricular activities can provide students with a means to explore alternatives that interest them, without feeling that they have to make premature judgments on that point. The William Mitchell College of Law has developed an exemplary system of web-based advising that helps students see the range of options available to them, the faculty who may have relevant expertise, and the host of extracurricular options that might be explored in making choices about professional identity and future career choices.[268]

Second, students should be helped to visualize and take responsibility for their emerging professional strengths and weaknesses. Unfortunately, many law school grading practices undercut that possibility. Law school assessment practices have, with justification, been criticized on a number of grounds.[269] Law students' overall experience and incentives for learning are in large part shaped by their experience with grading in the first year of law school. Unfortunately, that experience often leaves students convinced that they have little control over their performance and less insight about how to improve. That situation might be addressed if law faculty and students better understood what can really be assessed through traditional essay exams and how those realities should drive changes in first year grading systems.

Law school essay questions typically present complex scenarios that provide students with a platform they can use to demonstrate

---

268. *See* William Mitchell Coll. of Law, Pathways, http://www.wmitchell.edu/pathways/ (last visited Sept. 14, 2009) (describing a web-based advising system connecting students to courses related to areas of professional interest and extracurricular activities).

269. *See, e.g.,* MUNRO, *supra* note 135; Philip C. Kissam, *Law School Examinations,* 42 VAND. L. REV. 433 (1989); Ron M. Aizen, *Four Ways to Better 1L Assessments,* 54 DUKE L.J. 765 (2008); Steven Friedland, *A Critical Inquiry Into the Traditional Uses of Law School Evaluation,* 23 PACE L. REV. 147 (2002); Greg Sergienko, New *Modes of Assessment,* 38 SAN DIEGO O. REV. 463 (2001); EDUCATING LAWYERS, *supra* note 1.

their expertise as emerging professionals with growing ability to "think like lawyers". [270] They must read carefully,[271] comprehend the implications of what they read, analyze the issues, apply relevant doctrine, synthesize insights from a wide range of cases and statutes previously studied, and evaluate alternative approaches to uncertain and difficult areas.

Well-crafted essay questions provide an effective setting in which levels of expertise relating to critical thinking can be assessed. Expertise itself reflects extensive knowledge and sophisticated organization of that knowledge, an ability to recognize and retrieve patterns, a capacity to tie knowledge to context, a fluid ability to recall and use strategies, and capacity to respond flexibly and in an adaptive way to novel problems. These are precisely the characteristics that law students need to display in answering essay exams.

The fly in the ointment is less in the form of essay questions themselves than in the high stakes way in which such questions and exams are used and the way grading systems have been constructed to compare students with each other in ways that overstate purported precision of evaluation.

Numerous authors have criticized law schools for the use of high-stakes "summative assessment" (one-time exams at the end of the term that are used to make an ultimate evaluation of student performance) in the absence of "formative assessment" (opportunities to receive feedback that can help students recognize ways in which they may be off the mark and can potentially improve going forward).[272] Single final exams without formative feedback along the way tends to advantage those who enter law school with the strongest critical thinking skills based on earlier experience or specific types of ability, since they do not need much "coaching" and can pick up requisite skills relatively quickly, particularly if they do not have to bear the added burden of dynamics related to "stereotype threat."[273]

---

270. *See supra* Part II.C.1.

271. *See* Leah M. Christensen, *The Paradox of Legal Expertise: A Study of Experts and Novices Reading the Law*, 2008 B.Y.U. EDUC. & L.J. 53 (2008).

272. *See, e.g.*, EDUCATING LAWYERS, *supra* note 1.

273. The classic study developing the concept of "stereotype threat" was conducted by Claude Steele and Mark Aronson. *See* C.M. Steele & J. Aronson, J, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY AND SOC. PSYCHOLOGY 797 (1995) (discussing theory of "stereotype threat," relating to the added cognitive pressure experienced by those taking high-stakes ability-related tests, when a particular salient stereotype is triggered, and those subjected to such tests accordingly experience differential pressure to perform in ways that disprove the stereotype); *see also* C.M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613 (1997).

Translating performance on essay questions and exams into overly precise "grades" and accumulating course grades into detailed grade point averages and class standings is a major problem in its own right. Expertise develops in stages as individuals move along a developmental curve, from novices to advanced beginners, those with basic competence, those who are proficient, and those who are truly "expert." In the law school context, these characteristics are evident in exams with familiar characteristics. Novices have difficulty in reading problems, fail to recognize the need to apply legal principles to facts, and have little appreciation for principles that are relevant. Those with limited proficiency typically display an overly simplistic, incomplete analysis that misses key issues and fails to use relevant legal rules, facts and policy. Those with basic competence reflect formalistic analysis that recognizes many issues, distinguishes relevant and irrelevant principles, and makes substantial but incomplete use of relevant rules, facts and policy. Those with proficiency or an intermediate level of competence reflect integrated analysis that addresses nearly all issues, focus on and develop relevant rules, facts and policy in a meaningful way, reflect conceptual understanding rather than a formulaic approach, and spot but do not work extensively or effectively with issues involving substantial uncertainty or novelty. Exam answers that reflect expert or advanced proficiency demonstrate the characteristics of intermediate proficiency, but also consider implications of analysis more fully, bring to bear sound and creative approaches, and work extensively and effectively with issues involving substantial uncertainty or novelty. Discernible "macro" differences in expertise might therefore allow absolute "grades" similar to F, D, C, B, and A.

If indeed that is the case, other questions follow. Levels of expertise are not really amenable to grading on a "microcosmic" level (on a 100 point scale, as opposed to the stages of development described above). They develop over time (so that by late in law school, students may have much more clustered levels of capacity, even though they are more widely distributed at the start). Moreover, it seems artificial and inconsistent with the notion of expertise to try to "score" expertise in *comparative* terms (is one student who is performing at the level of "competence" more or less "competent" within that band of expertise compared to another "competent" student?).

Finally, at present, the same focus for assessment (critical thinking) and the same format tends to be used not only for first year courses but in subsequent years as well. Are there other forms of expertise (not just expertise in critical thinking) that should be developed in law school beyond the first year? Could those other forms of expertise become valued and visible to faculty members and

students in the second and third years of law school? If so, might new goals and forms of assessment be used to stretch and engage students in setting higher aspirations for themselves in the last two years of law school and regaining a greater sense of control over their professional development?

Schools could and should create more meaningful ways of assessing student achievement beyond the first year,[274] both as a means of recognizing that there is more to "excellence" in lawyering than analytical problem-solving and as an enhanced set of incentives for students to appreciate and try to achieve in their last two law school years. Students could be given new opportunities to achieve law school honors by opting into the creation of outstanding professional portfolios that document their writing, interviewing, professionalism, problem-solving abilities, ethical commitments, and more.[275] A growing number of schools are beginning experiments with this kind of documentation, building on significant efforts already begun in undergraduate education and other professional fields.[276] At some point, such portfolios could give law schools much better evidence from which to engage in institutional assessment designed to improve specific areas of their programs (for example research, writing, trial skills, interaction with clients, professionalism). They might also provide a feasible alternative to the bar exam.

---

274. A growing number of faculty members and law schools are beginning actively to explore the powerful potential of more sophisticated assessment techniques. For an array of very helpful materials and videotaped presentations from a major conference on assessment hosted by the Strum School of Law at the University of Denver in Sept. 2009, see Sturm Coll. of Law, Legal Education at the Crossroads v. 3.0: Conference on Assessment, http://www.law.du.edu/index.php/assessment-conference/program (last visited Sept. 16, 2009).

275. For background on educational portfolios and their use, see GEORGE LORENZO & JOHN ITTELSON, EDUCAUSE LEARNING INITIATIVE, DEMONSTRATING AND ASSESSING STUDENT LEARNING WITH E-PORTFOLIOS (Diana Obinger ed., 2005), http://net.educause.edu/ir/library/pdf/ELI3003.pdf; K. Mills Court & M.R. Amiran, *Metacognition and the Use of Portfolios, in* PORTFOLIOS: PROCESS AND PRODUCT 101 (Pat Belanoff & Marcia Dickson eds., 2000). PORTFOLIO TEACHING: A GUIDE FOR INSTRUCTORS (J. Zubizarreta ed., 2003); JOHN ZUBIZARRETA, THE LEARNING PORTFOLIO: REFLECTIVE PRACTICE FOR IMPROVING STUDENT LEARNING (2004).

276. For examples of law schools that have given close attention to student portfolios, see S. DAILEY & K. BARRY, THINKING OUTSIDE THE BOXES: USING ELECTRONIC PORTFOLIOS TO ENCOURAGE STUDENT REFLECTION AND SELF-ASSESSMENT (last visited Sept. 12, 2009), http://www.abanet.org/legaled/committees/subcomm/ Outcomepercent20Measurespercent20Finalpercent20Report.pdf; University of Glasgow, http://www.ukcle.ac.uk/resources/ict/ggsl.html (last visited Sept. 16, 2009); UK Centre for Legal Educ., Using E-Portfolios in Legal Education, http://www.ukcle.ac.uk/research/projects/eportfolios.html (last visited Sept. 16, 2009) (providing extensive reports, information on presentations, and themes developed during UK study).

In an important way, development of such a portfolio system would also aid the reintegration of many parts of law school life that have splintered apart over the years, while also providing individual law students with more integrated and meaningful learning and professional development experiences. Career counselors and individual faculty members often have few means of advising students about professional careers geared to student interest, since their data is often limited to class recitation and grades on anonymous final exams. Students increasingly spend enormous amounts of time in extracurricular activities that are generally totally disconnected with what they do in the classroom. Recent studies have demonstrated that informal learning in settings outside the classroom can be enormously beneficial in shaping students' future career interests and diverse abilities.[277] A structured set of portfolio elements could help shape students' focus and encourage high quality work in these settings by making potential work products more visible and more highly valued. Employers, too, could benefit from access to this kind of record of student reflection and accomplishment, thereby encouraging attention to more than class rank and grades. Given the current "shake out" of the legal industry in the face of the economic downturn, evidence of this sort could provide an important way for students and law schools to document the quality and job-readiness of their graduates.

In summary, the "wicked problem" of the advanced law school curriculum is not one that can be easily cracked. Close examination of this problem reveals an interrelated set of challenges, ranging from enhancing the sense of mission and coherence within individual law schools, to fostering progression beyond the first year, to enhancing the curriculum, course design, and pedagogy, to appreciating and addressing fundamental developmental challenges facing "emerging adults" that can be more effectively supported through better advising and more meaningful strategies for recognizing their professional achievements.

CONCLUSION

This essay has sought to contribute in a number of ways to the national conversation about the future of legal education.

The essay first proposed a fresh metaphor for conceptualizing educational reform dilemmas, drawing upon the understandings about "wicked problems" that have emerged in design and public policy fields. To illustrate key aspects of the "wicked problems"

---

277. *See* PHILIP BELL ET AL., LEARNING SCIENCE IN INFORMAL ENVIRONMENTS: PEOPLE, PLACES, AND PURSUITS (2009) (discussing importance and potential of informal learning environments).

literature, it employed the familiar tale of *Rumpelstiltskin*, itself a tale focused upon two related "wicked problems" (spinning straw into gold and "naming" a fundamental threat). *Rumpelstiltskin* in turn provided several memorable lessons about how wicked problems can best be approached: pay attention to the commonplace, consider the invisible as well as the visible, recognize the power of names and naming, and renegotiate when you hit a dead end. The latter portion of the essay then used each of these lessons as a launching point for reframing a key dilemma facing legal educators and providing fresh ways to approach those dilemmas with the help of research literature from other fields.

The allocation of responsibility for lawyer preparation (between those in the academy and those in the profession) is a dilemma that has proved controversial for years. The essay suggests that the "commonplaces" underlying the work of professionals, developed by Lee Shulman in connection with comparative studies of professional education by the Carnegie Foundation for the Advancement of Teaching, provides a fresh and fruitful point of connection (rather than division) worth close attention by both law teachers and lawyers. These "commonplaces" lie at the center of professional life and are addressed to some degree during law school. More conscious attention to these central dimensions of professional life, using a deeper, unifying, intellectual framework, may well spur more effective educational reform (for example, in helping students to embrace rather than flee from uncertainty and in thinking about substantive coursework in terms of the "community of practice" in which graduates might engage).

The essay then considers a second fundamental dilemma: why do changes in content alone generally not result in enduring improvements in legal education? Using the second lesson from *Rumpelstiltskin* (pay attention to the invisible as well as the visible) as a starting point, it explores important insights relating to learning and teaching that were central to the recent *Carnegie Report*. Learning is often invisible, since it occurs within the minds and hearts of students. Although learning itself may be invisible, the dynamics of learning are increasingly well-understood. Three key dimensions of learning are highlighted: the centrality of expertise, the significance of assessment, and the multiple, interrelated dimensions of learning during metaphorical "apprenticeships" that address cognitive, skill-related, and values/identity-related growth. Ironically, many of the dimensions of effective teaching are also invisible, even to engaged teachers. The power of instructional strategies, particularly "signature pedagogies" that shape students very deeply, must also be made more visible so that they can be more fully understood and more wisely deployed. Unless these dimensions

of learning and teaching are more deeply engaged by those who wish to reform legal education, it is unlikely that meaningful improvements can be made, even when issues of content are ably addressed.

The essay then considers the extent to which educational reform should endeavor to de-emphasize "thinking like a lawyer" and the "case" or "Socratic" method, as suggested in many past critiques of legal education. Drawing on the third lesson derived from *Rumpelstiltskin* (attending to the importance of names and "naming"), the essay delves more deeply into both learning and teaching in the first year, drawing on field work conducted in connection with the recent *Carnegie Report*. The Carnegie research team observed classes and conducted extensive interviews with students and faculty members at field sites in order to ask what both students and faculty members understood by the phrase "thinking like a lawyer." This essay draws upon that information to explicate in considerable detail the specific dimensions of learning encompassed by that phrase, in hopes that such nuanced explanations may assist law students in the future.

In particular, "thinking like a lawyer" involves introducing students to critical dimensions of "thinking" (whose core features resemble the core features of critical thinking in other contexts), "the law" (the landscape in which it is situated, its vocabulary and texts), and the lawyers (their roles and norms). Legal education's dedication to teaching students to "think like lawyers" also forces students to grapple with uncertainty from the very outset of their professional careers. "Thinking like a lawyer" cannot be viewed in isolation, however, since teaching students about critical thinking succeeds because first year professors remain committed effective use of the "case-dialogue method" in their teaching. The essay therefore endeavors to "unpack" the "case-dialogue method" in order to explicate the ways in which this method allows focused attention to essential intellectual tasks, while employing core instructional techniques associated with effective teaching associated with "cognitive apprenticeships."

Finally, the essay confronted one of the most challenging of legal education's "wicked problems": why have legal educators been so disinclined and unable to improve the upper division curriculum for students overall, and what might be done to improve the educational experience during law school's last two years? Once again, the essay took as its starting point a lesson from *Rumpelstiltskin*: renegotiate when you hit a dead end. It first addressed why reforming the upper division curriculum is a paradigmatic "wicked problem," before proposing four different ways to engage in such renegotiation: undertaking purposeful redesign on the large scale, rethinking

content, rethinking pedagogy, and rebalancing teaching and learning responsibilities.

This is an exciting time in legal education, with many diverse voices being raised to develop better solutions to enduring "wicked problems." As discussed above, meaningful resolutions of challenging problems require careful attention to differing viewpoints, attention to the many interrelated dimensions of enduring challenges, and imaginative experimentation with possible responses.

Rutgers-Newark School of Law has contributed in many ways to the improvement of legal education during its first 100 years. Others across the country would do well to pay close attention to the leadership that will undoubtedly be provided by Rutgers-Newark in addressing legal education's enduring "wicked problems" in the days to come.

***